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CHARLES ELMORE CROP
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 469.

TEXAS AND NEW ORLEANS RAILROAD COMPANY, *et al.*,
Petitioners,

vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
ETC., *et al.*,
Respondents.

BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., PETITIONERS.

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Respondents.

BRIEF OF TEXAS AND NEW ORLEANS RAILROAD COMPANY, ET AL., PETITIONERS

The opinions of the District Court in this cause are reported:

Brotherhood of Railway Clerks, et al. v. *Texas and New Orleans Railroad Company, et al.*, 24 Fed. (2nd) 426; 25 Fed. (2nd) 873; and 25 Fed. (2nd) 876.

The opinion of the Circuit Court of Appeals in the cause is reported:

Texas and New Orleans Railroad Company, et al. v. *Brotherhood of Railway Clerks, et al.*, 33 Fed. (2nd) 13.

GROUNDS OF JURISDICTION:

Jurisdiction of this Court is invoked under Section 240 of the Judicial Code on the following grounds:

That the cause involves grave questions of vital importance to the public.

That the Circuit Court of Appeals rendered a decision in conflict with the decision of another Circuit Court of Appeals on substantially the same matter, and has decided important questions of general law in a way probably untenable and in conflict with the weight of authority.

That said Court has decided an important question of Federal law which has not been but should be settled by this Court, to-wit,—the proper construction of the Railway Labor Act of 1926.

That it has decided Federal questions in a way probably in conflict with the applicable decisions of this Court.

That it has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by the District Court, as to call for an exercise of this Court's power of supervision.

The judgment sought to be reviewed is that of the Circuit Court of Appeals for the Fifth Circuit rendered June 10, 1929 (R. 1144), which became a final judgment by the overruling of petitioners' motion for a rehearing on August 10, 1929. (R. 1145.)

Petition for writ of certrorari was duly filed in this Court on October 30, 1929, and was granted on December 9, 1929 (R. 1147).

The suit was instituted under the Constitution and laws of the United States by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Southern Pacific Lines in Texas and Louisiana, a voluntary association, alleged to have membership in the States of Texas and Louisiana, and H. W. Harper, an alleged employee of the petitioner Railroad

Company, who was on indefinite leave of absence, devoting himself entirely to the affairs of said Brotherhood, against Texas and New Orleans Railroad Company, a Texas corporation, having its domicile in the Southern District of Texas, and its officers and agents, for an injunction enjoining and restraining the defendants from interfering with, influencing or coercing its clerical employees in the right of self-organization and designation of representatives for the purposes of the Railway Labor Act, 1926 (44 Stat. L. 577), in alleged violation of the third paragraph of Section 2 of said Act (Original Bill R. 6-72; Amended Bill R. 314-370). The Act in question is, so far as material, set our in Appendix A of this brief.

The court, after notice and hearing, granted a temporary injunction, enjoining and restraining the Railroad Company, petitioner herein, its officers and agents from in anywise interfering with, influencing or coercing its said clerical employees in the respects stated (R. 82). Thereafter the Railroad Company, on the claim and showing by a rival organization known as Association of Clerical Employees, Southern Pacific Lines in Texas and Louisiana, recognized said last named organization as representative of the clerical employees, and took other action, hereinafter fully set forth, which naturally folowed the recognition of the Association and consequent non-recognition of the Brotherhood. Thereafter also three clerks, members of the complainant Brotherhood, were discharged by the Railroad Company for causes not connected with their said membership or with this litigation. Said action was charged to be in violation of the temporary injunction (R. 91-161), and was so adjudged, petitioners herein being required to reverse the same, and to continue favors theretofore granted officers of the Brotherhood (R. 263-269).

On April 19, 1928, on hearing on the merits, order continuing the terms of the contempt order (R. 394) and final decree making the temporary injunction permanent (R. 402) were entered. Petition for appeal (R. 1093) was filed July 13, 1928, and on the same day was allowed (R. 1094), amount of cost bond was fixed, and supersedeas was denied. Bond for appeal (R. 1095) and assignments of error with prayer for reversal (R. 1097) were filed July 13, 1928.

The record was filed in the United States Circuit Court of Appeals for the Fifth Circuit on August 2, 1928, and the cause was thereafter duly heard, and was decided by that Court as above set forth.

The following rulings of the Courts below are relied on as bases for the granting of the writ and the reversal of the judgments:

1. The District Court held in this cause that the Third Paragraph of Section 2 of the Railway Labor Act of May 20, 1926 (44 Stat. L., 577): "Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other," forbade officers and agents of petitioner, Texas and New Orleans Railroad Company, to recommend to its clerical employes membership in a local association of employes in preference to the respondent Brotherhood, or to inform said clerical employes that concessions could probably be obtained from the employer through the local organization which could not be obtained through the Brotherhood, and that such persuasion and advice should be enjoined and thereupon did enjoin the same, notwithstanding the opinions of this court in *Pennsylvania Railroad Company v. Labor Board*, 261 U. S. 72, and *Pennsylvania Railroad Federation No.* 90 v. *Pennsylvania R.*

R. Co., 267 U. S. 203, dealing with a substantially identical statute.

2. The court held that said statute prevented either party, employer or employe, from so influencing or attempting to influence the other in the selection of representatives or in organizing, and that in so doing it is not unconstitutional and does not take away inherent or inalienable rights, and enjoined petitioners accordingly, notwithstanding the decisions of this court in *Adair v. United States*, 208 U. S. 161, and *Coppage v. Kansas*, 236 U. S. 1, and notwithstanding the *First and Fifth Amendments to the Constitution of the United States.*

3. The court held that the granting of such injunction is not forbidden by Section 52 of Title 29 of the United States Code, which is Section 20 of the Clayton Act, the essential portions of said statute being: "No restraining order or injunction shall be granted by any court of the United States or a judge thereof in any case between an employer and an employe * * * growing out of a dispute concerning terms or conditions of employment unless necessary to prevent irreparable injury to property or to a property right * * * . And no such restraining order or injunction shall prohibit any person or persons * * * from terminating any relation of employment * * *," (U. S. Code Title 29, Sec. 52), and enjoined petitioners accordingly, notwithstanding the "dispute" here involved is clearly within the class included in the statute and notwithstanding under the authority of the decision of the United States Circuit Court of Appeals for the First Circuit in *Foss v. Portland Terminal Co.*, 287 Fed. 33, on injury to property or to a property right appeared.

4. The court held that recognition by petitioners of the local association as the representative of the clerks employed by the railroad company upon a showing made by said association that it was authorized to rep-

resent a majority of such clerks, making public the fact of such recognition, and negotiating and agreeing with said local association with respect to increases in rates of pay, constituted interference, influence or coercion of the clerks within the meaning of the Railway Labor Act, was a violation of the injunction against such interference, influence and coercion, and was a contempt of the court which could be purged only by disestablishing the association and re-establishing the Brotherhood, respondent herein, as the representative of the said clerical employes, and required petitioners to so disestablish the association and re-establish the Brotherhood under pain of imprisonment of the individual petitioners until this should be done.

5. The court held that action of the petitioners in permitting officers and representatives of the association to organize, promote, manage and attend to the business of the association on the railroad company's time and without deduction for time lost or expense incurred constituted interference, influence or coercion forbidden by the statute, was a violation of the injunction, and a contempt of the court, and it enjoined any and all such action unless a similar privilege should be accorded to the officers and representatives of the Brotherhood.

6. The court held that the petitioners, in dropping two of the officers of the Brotherhood from the seniority rosters of the railroad company, on which they had been carried for a long time without rendering any service, and in ceasing to furnish them with free passes, insurance and hospital benefits customarily furnished only to employes, were guilty of interference, influence and coercion within the meaning of said statute; that said action was in violation of the injunction, and a contempt of the court, and it required that said so-called employes be restored to the seniority rosters and be

furnished by petitioners with free passes, insurance, and hospital benefits in like manner as if they were actual employes, under pain of imprisionment of the individual petitioners until this should be done.

7. The court held that the discharge by the railroad company, acting through other officers than those who are petitioners herein, of three clerical employes who were members of the Brotherhood and two of whom had made affidavits used by respondents in this litigation, for causes wholly unconnected with the suit or any matter involved in it, and adequate in the opinion of the employing officers, was interference, influence or coercion within the meaning of the statute, was a violation of the injuction, and a contempt of the court, and required petitioners to restore said clerical employes to the service without prejudice or loss of seniority rights, and to make them whole for any loss of pay they might have sustained by reason of their discharge, under penalty of imprisonment as before stated.

8. The court required petitioners to pay to the attorneys for the complainants, respondents herein, a fee for service and expenses in connection with the contempt proceeding herein notwithstanding said fee was in fact for procuring an extension and enlargement of the original injunction embodied in the contempt orders and not for service in any proceeding for actual contempt, under penalty of imprisonment as before stated.

9. The court has so framed and interpreted the temporary injunction, and so framed the final decree as to keep the petitioners in constant jeopardy of contempt, without being able to determine what action, however lawful in itself, they may take in the management and operation of an important instrumentality of interstate commerce, which they are bound by law to operate efficiently and economically, will be a violation of the injunction, which therefore can only oper-

ate as a snare to the petitioners.

Petitioners respectivelly contend that each and all of foregoing holdings and actions of the District Court are erroneous.

10. The Circuit Court of Appeals affirmed the judgment aforesaid, with, however, a dissenting opinion, without any review of the disputed facts, and this in a case where constitutional rights, based on such facts, are involved. *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287.

Petitioners respectfully contend that the ruling and holding of said Circuit Court of Appeals, in affirming the judgment of the District Court and especially without consideration by it of the disputed facts, is erroneous.

STATEMENT OF THE CASE:

Pleadings:

The Brotherhood of Railway Clerks, and H. W. Harper, its General Chairman, filed their bill July 25, 1927, against petitioners' railroad company, its officers and agents, and certain of its clerical employes, officers and members of the local association hereinbefore referred to, alleging that the Brotherhood was organized about September, 1918, and had acted as representative of certain clerical employes of the Southern Pacific Lines in negotiations with the company. That in November, 1923, the company and this Brotherhood made a written agreement covering rates of pay and working conditions. That in November, 1925, it had applied for a further increase in wages, which was refused by the company and an appeal taken by the Brotherhood to the United States Railway Labor Board. This appeal was pending when the Railway Labor Act of 1926 took effect, was remanded to the parties and thereafter came before the Board of Mediation created by this last statute. The bill then details the proceedings had before this Board of Mediation which extended through 1926 into

1927 and avers in the fifth paragraph:

> "That about June, 1927, the defendant Texas & New Orleans Railway Company and its officers (naming them) unlawfully conspired together with the other defendants and undertook, instigated and encouraged the formation of a so-called 'company' union of railway clerks in defendant's employ for the express purpose of interfering with, influencing and coercing the plaintiff railway clerks concerning the formation and maintenance of labor organizations among themselves and the designation by said rail clerks of a representative or representatives to represent and act for them in this the pending controversy before the United States Board of Mediation." (R. 27-28.)

The acts alleged to have been done in pursuance and furtherance of ths charged consipiracy are in substance that the defendants caused a petition, addressed to the railway management, to be presented to all or a large majority of the clerks for signature, in which the clerks requested permission to take steps necessary to the formation of this association to act for them instead of the Brotherhood. That in order to procure signatures to this petition the defendants, Ehlinger, McDaniel and others, who were clerks interested in the organization of the association, and certain agents (three in number) of the company solicited members of the Brotherhood for signatures and told them that the railway company would not grant any increase in rates through the Brotherhood, that their association with the Brotherhood would do them no good, that the officers of plaintiff Brotherhood were only feathering their own nest. These parties are also alleged to have stated that if the clerks joined the association and the association was selected to act for the employes, the Southern Pacific Lines would grant increases to these employes aggregating about $75,000.00 a year. That various clerks were threatened by other clerks interested in the association, with loss of vacation and similar privileges if they did not sign, and at least one clerk who did not sign had been deprived of his pass privilege.

Upon these allegations, which are elaborated in much detail in the 5th to 8th paragraphs inclusive (33-43) a temporary injunction was sought to prevent the defendants from in any manner intimidating any of said employes with respect to their free right to select and designate representatives for the purpose of considering and contesting disputes under the Railway Labor Act; and to restrain the company from terminating the contract alleged to have been entered into between the Brotherhood and the company and for general relief.

Attached to this original bill were seventeen *ex parte* affidavits (47-72), made by fourteen clerks, detailing conferences with them by members of the association and in some cases by said three agents, and arguments made to them to induce them to join the association.

The arguments disclosed by these affidavits are substantially the same in each instance and are in effect that the solicitor urged the affiant to join the association and stated that the Brotherhood could accomplish nothing, but that the association if authorized to act for the employes could get an increase in wages of approximately $75,000.00 which could not be had through the Brotherhood. Each affiant declares under his oath that he declined these blandishments and refused to join the association.

At the hearing of the application for a temporary injunction, which was immediate, petitioners filed *ex parte* affidavits (R. 413-439 and 453-458), the substance of which was that neither the railroad company nor its officers had caused the formation of the Association—

the so-called "company union," but that it had been formed by the clerks themselves; that it claimed to represent a majority of the clerks and had requested recognition, but that the railroad company had put it off with the statement that it would not consider its claim until the pending mediation proceedings with the Brotherhood should have been disposed of or dismissed; that there had been no interference, influence or coercion by the railroad company or its officers of the clerks, but that several officers and employes of the railroad company had and, until it should be declared unlawful for them to do so, intended to continue, by advice, reasonable argument and persuasion, to present to said employes the advantages, as they see it, of the employes being, becoming or remaining members of the Association rather than of the Brotherhood.

On October 22, 1927, complainants, the Brotherhood and H. W. Harper, filed an information charging petitioner railroad company and its officers, H. M. Lull, G. S. Waid and John G. Torian, with contempt of court, and procured a rule thereon to show cause why they should not be punished. (R. 91-161.) The following are the acts of alleged contempt charged in said information as in violation of the temporary injunction theretofore, on August 2, 1927, issued by the District Court:

(a) Publication of a letter, bearing date August 6, 1927, from J. G. Torian to F. C. Ehlinger, General Chairman of the association, recognizing the association as representative of the clerks, and Torian's further letter of August 9, 1927, to the various Division Superintendents, advising them of the fact of recognition. (R. 96-97.)

(b) Action of Torian on August 20, 1927, in granting, by agreement with the officers of the Association, an advance in wages to all clerks which the association and the Brotherhood claimed to represent.

(c) Action on the part of H. M. Lull, Executive Vice-President, and of other officers of the Railroad Company, in declining to reverse the action of Torian in recognizing the association as representative of the clerks.

(d) That representatives of the Brotherhood, when absent from work for the purpose of demanding that the Brotherhood be recognized in perference to the Association, had deductions made from their pay for time so lost, while representatives of the Association were exempted from similar deductions.

(e) That Harper and Walker, officials of the Brotherhood, were dropped from seniority rosters, their passes taken up, and certain insurance and hospital benefits terminated.

(f) By affidavits, filed during the course of the hearing, that three clerks, Stotzer, Hudson and Ginsburg, were discharged because they were members of the Brotherhood.

Petitioners' answer to this information alleged the following facts:

That the recognition of the Association only came after it had exhibited authorizations signed by employes who were regarded as constituting a majority of the membership eligible to these orders. That the Association had been formed and all but recognized when the injunction proceedings were instituted and when the court's temporary order was entered, and all that was done after these dates was to receive and check the list of employes who had signed these letters of authorization, found at pages 460 to 467 of the Record, ascertaining that they constituted a majority and according them the recognition that they were entitled to have.

That the making of the wage agreement which followed on the 20th of August was for the benefit of all the employes, and was with the association, which had been duly recognized on August 6th.

That all the other matters complained of and charged to constitute a violation of the court's injunction were things that logically and naturally followed the recognition of the Association, or were within the rights of the company, or were untrue. For instance that neither Harper nor Walker were in fact entitled to remain on seniority rosters while performing no service for the railroad company, nor to receive free passes or other privileges, except while their organization was recognized as representing the clerks, and then only during the pleasure of the company, and that Stotzer, Hudson and Ginsberg were discharged for adequate cause in no wise connected with the Brotherhood, or its claims. (R. 171-185.)

On March 6, 1928, complainants amended their bill (Record pages 314 to 370), omitting all defendants except Texas and New Orleans Railroad Company, and all the individual defendants were thereupon dismissed from the proceeding, except the defendants Lull, Waid and Torian with respect to the contempt proceeding. On March 13, 1928, during the final hearing, A. R. Campbell, B. G. Hudson, R. E. Stotzer and John C. Moulin, clerks in the employ of the defendant company, filed a bill of intervention, adopting the allegations of the amended bill. (R. 383-384.) On March 30, 1928, the complainants, Brotherhood and Harper, filed an amendment to their first amended bill of complaint (R. 386-387), and on the same day said interveners filed an amendment adopting the allegations thereof. (R. 385.) The amended pleadings of the complainants did not tender any additional issues.

Petitioners, defendants below, in due time filed motion to dissolve the temporary injunction (R. 272), original and amended motion to dismiss the complaint

(R. 292), and original and amended answer (R. 301), the motions comprehending the points set up in this brief, and the answer denying in due form the material allegations of the bill, that is, that the Association of Clerical Employes had been created, directly or indirectly, by petitioners or that it was anything except an organization formed in good faith by the employes themselves, and expressly denying any unlawful interference, influence or coercion of the self-organization or designation of representatives by the employes.

Hearings and Orders of District Court:

On hearing of the application for a temporary injunction the court entered an order enjoining and restraining the defendant railroad company, its officers and agents from interfering with, influencing or coercing the clerical employes in their right of self-organization and designation of representatives. (R. 94.) Injunction against the individual officers and members of the association of the Clerical Employes was denied. (R. 82-84.)

The injunction order is as follows:

> "(1) That the injunctions prayed for against the defendants F. C. Ehlinger, J. C. McDaniel and C. W. Derrington, as individuals, be, and the same hereby are, denied;
>
> "(2) That the injunctions prayed for against the defendants A. D. McDonald, R. C. Watkins, P. C. Gebhart, F. H. Bednark, J. A. Pryor, H. M. Lull, G. S. Waid, J. G. Torian and C. E. Armstrong, as individuals, be, and the same hereby are, denied;
>
> "(3) That the defendant Texas and New Orleans Railroad Company (a corporation and common carrier owning, leasing, and operating certain railroads throughout the States of Texas and Louisiana), its officers, servants and agents are

hereby enjoined and restrained from in any way or manner interfering with, influencing, intimidating, or coercing plaintiffs or any of the approximately seventeen hundred clerical employes (and being the clerical employes described and referred to in plaintiffs' petition, which includes approximately seventeen hundred clerks in the employ of the defendant Railroad Company on its lines throughout the States of Texas and Louisiana, except such clerical employes as are employed and engaged in its general office in the City of Houston, Texas, and in its general office in the City of New Orleans, Louisiana), with respect to their free and untrammeled right of selecting or designating their representatives for the purpose of considering and deciding any and all disputes between said clerical employes and the defendant Railroad Company; and further enjoining and restraining said defendant Railroad Company, its officers, servants, and agents from in any way or manner interfering with, influencing, intimidating, or coercing plaintiffs, or any of said clerical employes herein referred to of their free and untrammeled right of self-organization.

"Nothing in this injunction shall be considered or construed as authority to prevent any employe of said defendant Railroad Company, in the class referred to, from organizing, joining, promoting, or fostering as many unions as he or they (meaning such employes in the class referred to) may desire, and in any way which he or they may desire, and with the assistance and aid of any of his fellow employes (in the class referred to) may desire; nor shall anything in this injunction be considered or construed as authority or permission for any officer or agent of said company, or any employe, acting for or on behalf of the defendant Railroad Company, attempting to influence or to interfere with said selection or designation of their said representatives, or their right to self-organize as herein referred to, upon any pretext that they are acting individually and not as representatives of said defendant corporation.

"(4) All other preliminary or temporary relief prayed for in complainants' bill is at this time refused without prejudice to any rights to any part of such other relief as complainants might later show themselves entitled to." (R. 82-84.)

No appeal was taken from this order and any and all activity on the part of officers and agents of the railroad company in the matters complained of in the bill and affidavits ceased.

On February 6, 1928, the court entered an order finding petitioners, Texas and New Orleans Railroad Company, H. M. Lull, its Executive Vice-President, G. S. Waid, its Vice-President and General Manager, and J. G. Torian, Assistant to the Vice-President and General Manager, guilty of contempt (R. 237-262), and pursuant thereto, on February 11, 1928, entered an order accordingly.

In said order it was decreed "that among other things done by said defendants were certain acts and conduct in violation of law and in disobedience of this court's restraining order, and that in order to purge themselves of said contempt said defendants and each of them, must file in the office of the clerk a sworn statement within ten days from the date hereof, agreeing that they, and each of them, will do, perform and accomplish, or cause to be done, performed and accomplished, the following acts: * * *

"(1) Completely disestablish the Association of

Clerical Employes as it is now constituted as the recognized representative of the Clerical employes of the Texas and New Orleans Railroad Company in the States of Texas and Louisiana.

"(2) Cease to permit officers and representatives of said association to organize, promote, manage, and attend to the business of said association, or any organization of said clerical employes hereafter formed, on the said Texas and New Orleans Railroad Company's time and pay, and at its expense and under the aegis of the authority of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, unless a similar privilege is accorded to the officers and representatives of complainant Brotherhood.

"(3) Reinstate and re-establish the said complainant Brotherhood as the representative of said clerical employes in all matters relating to their employment, by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera*, substantially as said status was on June 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, and without the dictation or interference of said Texas and New Orleans Railroad Company, H .M. Lull, G.S. Waid and J. G. Torian, shall choose another representative or representatives.

"(4) Restore H. W. Harper and John W. Walker to the service of said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights.

"(5) Restore to said H. W. Harper and John W. Walker the pass privileges over the lines of

Texas and New Orleans Railroad Company which they enjoyed prior to August 6, 1927.

"(6) Restore R. E. Stotzer, B. G. Hudson and Charles Ginsberg to the service as employes of the said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights, and make whole said Stotzer, Hudson and Ginsburg for any losses of pay they have sustained by reason of their discharge in violation of the temporary injunction herein, and in contempt of this court.

"(7) Pay all costs of court accrued in connection with this contempt proceeding, and further pay to Fulbright, Crooker & Freeman, as attorneys for the complainants herein, the sum of Two Thousand Dollars ($2,000), which is allowed to said complainants herein to cover reasonable and necessary attorney fees and expenses herein in connection with these contempt proceedings." (R. 263-268.)

In default of compliance with said decree the individual defendants were ordered confined in jail until they should comply.

Within the time limited the order was complied with, (R. 269), petitioners each and all duly excepting to the order (R. 271), but being unable to take an appeal until after trial on the merits and the entry of the final decree.

Upon the trial all of the affidavits and pleadings of both parties which had been used in the prior proceedings were introduced in evidence, additional affidavits and documents were introduced and oral testimony was taken.

On the 19th of April, 1928, the court entered an order and rendered final judgment sustaining and continuing all prior orders and decrees and perpetuating the temporary injunction, (R. 402) but in the order, which is in effect a part of the final decree the court modified the third paragraph of the contempt order of February 11th with reference to a secret ballot by permitting the employes, by agreement among themselves, to adopt some other method of selecting representatives, and in all other particulars reaffirmed and continued in full force the several provisions of the order of February 11th., (R. 394-395.) said paragraph, in its final form, being as follows:

> Reinstating and re-establishing the said Brotherhood as the representative of the clerical employes in all matters relating to their employment by the said Railroad Company, disputes as to pay, working conditions, etc., substantially as said status was on June 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this Court, or by any other means of selection which the employes themselves may decide upon and adopt, and without the dictation or interference of the said Texas & New Orleans Railroad Company, H. M. Lull, G. S. Waid, or J. G. Torian, shall choose another representative or representatives. (R. 392.)

The Facts:

1. The suit grows out of, and essentially involves, a dispute between two labor organizations with respect to the right, claimed by both, to represent the clerical employes (outside of general office force) of petitioner Railroad Company, and to negotiate with it in their behalf.

2. The respondent, Brotherhood of Railway and Steamship Clerks called throughout this brief "Brotherhood" first appeared as claiming to represent the employes of the company during the period of Federal con-

trol not by the choice of the employes but by virtue of Supplement No. 7, General Order No. 27 of the Director General of Railroads which became effective September 1, 1918. (R. 414,815.)

Beginning about that date it has constantly endeavored to obtain members among the clerical employes of the railroad, though it has never had more than about a third of them. (R. 965-7.)

At the time of the trial it claimed a membership of 463 out of a total of approximately 1,855 clerks eligible to membership (R. 966-7.), as against membership of 894 in the rival organization, the so called "company union" or Association. (R. 1026.)

Respondent Brotherhood is a national organization, controlled by a Grand Lodge and by socalled-Grand Officers, or a branch or department thereof.

Autocratic powers are vested in its Grand President, Grand Secretary-Treasurer, and Grand Vice Presidents, the officers named constituting the Grand Executive Executive Council. (R. 993-1011.) It charges and collects initiation fees from all new members, of which half goes to the Grand Lodge. It collects dues of not less than $2.00 per month from members. (R. 1012.) It maintains an organization fund for the purpose of bringing pressure to bear on non-members to become members of the organization. See section 1 of its Constitution. (R. 1012-13.)

The Brotherhood is essentially under the domination of a foreign, non-resident management.

3. "The Association of Clerical Employes of the Southern Pacific Lines in Texas and Louisiana" herein generally referred to as the Association is a voluntary association, the membership of which is limited to clerical employes of the Lines named, except general office force. (R. 145-146.) Its object is to promote and maintain harmonious and mutually satisfactory relations between

the employes and the officers of their employers, and to provide means for the orderly and proper handling and satisfactory disposition of any questions or disputes that may arise concerning wages and working conditions. (R. 146.)

The genesis of this organization is as follows:

(*a*) On July 3, 1922, the United States Railway Labor Board adopted and published a resolution, which, after reciting the calling of strikes by certain national railroad organizations and the taking of strike ballots by others, including the Brotherhood of Railway and Steamship Clerks, etc., which might result in the classes of employes represented by them leaving the employ of carriers, and that in the future it would be desirable, if not a practical necessity, for the employes of each class on each railroad line or system to form some sort of association or organization to function in the representing employes; recommended the formation of such associations or organizations. (Record pp. 1018-19.)

(b) In March, 1923, certain clerical employes of Texas and New Orleans Railroad Company, and its lessor companies, attempted to form an organization of members of personal office forces and division office clerks, to be wholly separate and apart from, and in opposition to Brotherhood of Railway Clerks, it being the view of said employes that a less radical organization than the Brotherhood was desirable, and that cooperation with the officers of the company rather than antagonism was also desirable. Practically all of the clerical employes within the limits above described became members of the proposed organization, which there-upon communicared with officers of the company and requested recognition. Said organization was informed that under the law (as interpreted by the Railroad Labor Board) the manage ment was compelled to deal with all clerical employes (outside of general office forces) as one class, and could not deal with it separately. The members of the organization thereupon extended the limits of their membership to all clerical employes of the Southern Pacific Lines in Texas and Louisiana (Texas and New Orleans Railroad Company and lessor companies), except general office employes, which have their own organization. (R. 431-432). The Association, thus created, secured a membership of a substantial majority of those entitled thereto, and requested the management to recognize it as representing the employes. The management, in view of the rulings of the United States Railway Labor Board in such matters, caused a secret ballot to be taken to determine whether or not the employes preferred the Brotherhood or the Association. (R. 432.)

Included in the clerical employes eligible to membership in both the Brotherhood and the Association are approximately 110 classed by the railroad company as "personal office forces," who are governed by all rules, rates of pay, and working conditions of other clerical employes, except that rules as to pay for over-time do not apply to them, their compensation being adjusted, in the first instance, to include over-time which they will work on an average, and except also, that, being selected for their personal qualifications for the positions, some of which are confidential in their nature, the ordinary seniority rules do not apply—that is, they are selected because of their qualifications without regard to seniority rules which govern other clerks. Such employes, nevertheless, retain their seniority on the various clerks' seniority rosters. (R. 524-5, 536-9.)

The United States Railway Labor Board had decided, and it was its settled policy, that while such personal office force employes were entitled to vote in all matters affecting rules, rates of pay, and working conditions of clerks, yet, if they were permitted by the management to vote, they thereupon became subject, without exceptions, to the rules, rates of pay, and working conditions, including seniority and overtime, governing all other clerks. Accordingly, the practical effect of the ruling of the Labor Board was to deny all personal office force employes the right of voting, and in arranging for the ballot personal office force employes were denied the right of voting and did not vote. (R. 572-5; 666.)

(*c*) The Association constitutes a departure from the union plan of national organizations and a large number of the employes in other crafts are under such union control and exercise influence and coercion over clerks to the extent that they require clerical employes to work against the Association instead of with it, even though they are favorable to it. This influence has prevented a large number of clerks from joining the Association. Such other organizations have exerted influence in that respect. Membership in the Association generally comes from places where intimate contact with Brotherhoods of other employes does not exist. (R. 760.)

In selecting representatives and the organizations to which they will belong, influence is brought to bear by the Brotherhood of Railway Clerks, on the one hand, and members of the Association, on the other, and, in addition, the Brotherhood has the persuasion of other railroad Brotherhoods (trainmen, yardmen and other classes) not directly connected with the controversy. (R. 761, 762-3, 1065.)

(*d*) Under the ballot, after excluding the approximately 110 personal office force employes, a total of 1,635 clerical employes were left, entitled to vote. Of these 1,073 actually voted, 611 in favor of the Brotherhood and 462 in favor of the Association, leaving 562 who cast no ballot. (R. 432 and 486.)

The Railroad company protested to the Labor Board that another and fairer ballot free from outside influence, should be taken. The Association, through its representa tives, also protested repeatedly and vigorously, and presented to the Board the petition of more than a thousand clerical employes, urging its recognition. These efforts were unavailing. (R. 1038-1063.)

3. On November 14, 1923, the assistant to the Vice President and General Manager of the Railroad Company addressed a letter to the representatives of the Association and of the Brotherhood as follows:

> "At conference yesterday I advised that the carrier would comply with Decision No. 1971 of the United States Railroad Labor Board and recognize the Organization of the Brotherhood of Railway and Steamship Clerks until such time as the majority of the clerical employes by secret ballot selected other representation, but that the carrier did not feel that the present minority representation of the clerical employes was fair to either the employes or the railroad. Out of the 1635 clerical employes in the service of these lines, outside of General Office, there were only 611 who voted to authorize the Brotherhood of Railway and Steamship Clerks to represent them. Expressed in percentages, this authorition constitutes only 37.37% of the employes directly interested, which cannot be termed anything but minority representation.
>
> "There can be nothing but unrest and general dissatisfaction so long as minority representation is in effect. The carrier is placed in a position where it has, on the one hand, a demand from the representatives of the Organization of the Brotherhood of Railway and Steamship Clerks to recognize them as the representatives of all of the 1635 clerical employes, although it is a known fact that they do not, at this time, hold authority of a majority of the employes to represent them,

> whilst on the other hand, the carrier has a protest from the representatives of the Association of Clerical Employes against the recognition of the Organization of the Brotherhood of Railway and Steamship Clerks, as the duly authorized representatives of the 1635 clerical employes on these lines, as the Association of Clerical Employes claim to hold definite authority from the majority of such employes. * * * (R. 486-488).

Thereafter, the Railroad company, to the extent required by the Labor Board, recognized the Brotherhood as representative of the clerical employes involved, signing a memorandum with its officers putting into effect the rates and rules promulgated by the Labor Board (R. 419-429); an addendum thereto (R. 429-430), and certain agreements with respect to positions and seniority upon the acquisition of control of other lines of railroad by Southern Pacific Lines. (R. 447, 123-127, 827.)

4. Thereafter, the Brotherhood demanded of the railroad a flat increase of 10 cents per hour in the pay of all clerical employes (excluding always general office employes) (R. 858-862), which was denied.

On October 15, 1926, the Brotherhood called upon the United States Board of Mediation to intervene in the matter, and on the 24th of the same month an employe of said Board appeared and offered to mediate. His offer was declined by the railroad company because he was himself not a mediator, and not authorized by the statute to act as such. On June 2, 1927, a member of the Board of Mediators appeared and there were thereafter various conferences between the railroad company, said mediator and representatives of the Brotherhood. At and prior to this time it was very well known that the membership of the Brotherhood was much less than a majority of the clerical employes involved. (R. 772-774.) (Letter, Lull to McDonald.) The Brotherhood circulated and sought to obtain signatures to a printed paper which it represented to be a questionaire, as follows:

> "The Brotherhood of Railway Clerks, on the Southern Pacific—Pacific System, on April 16, 1927, secured an increase of five (5) cents per hour, ($10.20 per month), retroactive to January 1, 1927, with back pay to cover. The Brotherhood Committee on these lines has a case, now being handled by the U. S. Board of Mediation, in which the employes request an increase of ten (10) cents per hour for all classes of employes represented by the Brotherhood. Our request is for a greater increase than was obtained on the Pacific System, but there is a complete justification for the ten cents which we are asking as our rates have always been more than five cents per hour below the rates paid on other railroads in the Southwestern territory, and the ten cents requested would no more than bring us up to the level on other roads.
>
> "The Brotherhood Committee has been meeting with former Governor Neff, who is the Government Mediator in our case, in daily conferences since June 2. The management contends that our request is 'unjust and unequitable,' and that the employes themselves will not supoprt the Brotherhood Committee in contending for ten cents per hour. In order to obtain the true sentiment of each and every employe in regard to this matter, it is requested that each employe (both members and non-members) fill out and sign the questionaire below, and forward same by return mail, to H. W. Harper, General Chair-

man, 211 Monroe Building, San Antonio, Texas.

"...

"*Place* *Date.*

"...

"Title of your position. Rate. Office or Department.

"Do you think that we are entitled to an increase of as much as 10 cents per hour man?......

"Would you be agreeable to a settlement for a sum less than (10) cents per hour?............

"If so, what amount do you believe would be just and reasonable?........................

"The above is an expression of my wishes in regard to the matter of an increase in pay, which is now being handled by the U. S. Board of Mediation, and I hereby authorize the Brotherhood of Railway Clerks to represent me upon the basis as outlined above.

"(Signed)............................."

R. 437-9, 863-868.)

5. At about the same time some of the clerical employes, who had theretofore been members of the Association of Clerical Employes, which Associarion had become dormant in the interval, determined to revive it and circulated papers for signature undertaking to revive the Association, obtaining many signatures thereto, and requested recognition by the management as representative of the clerical employes involved. Said employes selected representatives, who met, reorganized the Association, adopted a Constitution and elected officers on July 11, 1927. These, having secured what they conceived to be a sufficient number of authorizations to represent the said clerical employes, requested recognition of the railway company, but were advised that their authorizations would not be received, nor their claims considered, until the pending mediation proceed-

ings between the Brotherhood and the railroad company had terminated. (R. 895.)

The revival and reorganization of the Association of Clerical Employes was brought about through the efforts of various clerical employes of the railroad company, among them F. C. Ehlinger, chief clerk in the office of the Superintendent of said company at Ennis, Texas; C. W. Derrington, chief clerk in the office of Superintendent of said railroad company at Houston, Texas; J. C. McDaniel, chief yard clerk at Englewood Yards, near Houston, and D. D. Wade ,utility clerk in the office of the Division Engineer at Houston. The activities of these men and of other clerks working along the same lines was known to the officers of the railroad company having official positions as high as that of Division Superintendent, and no objection was made by said officers. Their efforts were made in part during working hours and on time for which they were paid by the railroad company. No deductions of wages were made on this account. Small items of expense incurred by them while on the line engaged in work for the company and at the same time engaged in work in behalf of the Association were included in their expense accounts, which were approved by the Superintendents or other officers for them and in due course paid by the Railroad Company. (R. 735-763, 764, 1021-30, 1032-5, 1036.)

The total amounts of said expenditures (not merely those incurred in organization work) were: May, 1927, $6.60; June, $45.85; July $54.99. (Exhibits between R. 1020 and 1021.)

6. In the course of the discussions with the mediator, the representative of the Railroad Company stated his belief that the Brotherhood did not in fact represent the employes, and declined to agree to arbitrate the demand for higher wages. The mediator, on July 25, 1927,

requested Harper, the representative of the Brotherhood, to furnish a list of its members. Harper promised to do so, but did not. Instead, on the same day, he caused the bill to be filed. (R. 851-2.)

7. The acts and words alleged by respondents and held by the District Court and the Circuit Court of Appeals to constitute unlawful interference, influence and coercion by petitioner Railroad Company and its officers of clerical employes in selecting representatives and organizing themselves are as follows:

By F. H. Bednark, an assistant superintendent:

Bednark came to the local freight office at Seguin, Texas, on or about June 20, 1927, asking for the agent. Not finding him, he went to the passenger station. About thirty minutes later the agent came to the freight office and stated to the employes there that he was speaking as personal representative of Bednark and wished to get each of them to sign a paper to the effect that they did not wish to be represented by the Brotherhood, but desired a committee of their own choice to handle their affairs, and to deal with the management through such committee. The clerks all stated that they did not care to sign the paper. Some minutes later R. E. Stotzer, one of the clerks, was called by the agent to the passenger sration, where he met Bednark, who talked to him for about an hour, his purpose being to get him to sign a paper renouncing membership in the Brotherhood and seeking "to create a dual organization." Bednark stated that the Brotherhood was not getting the clerks anywhere, nor getting them anything; that the new organization would deal direct with the management instead of through Harper and Walker, representatives of the Brotherhood, "who were only feathering their own nests" and did not care anything about the clerks. He said further that if Stotzer did not join the new organization he was not loyal to the Company.

Stotzer declined to sign, though professing a willingness to do anything he could for Bednark personally. Stotzer was and is a member of the Brotherhood (Affidavit of R. E. Stotzer: R. 65-67).

By P. C. Gebhart, Local Freight Agent at Dallas, Texas:

On or about June 5, 1927, W. R. Turk, a clerk in the Dallas local freight office, was told by another clerk he was wanted in the agent's office and, on going there, met the agent, Mr. Gebhart, and F. C. Ehlinger, chief clerk in the office of the Superintendent, Dallas Division, and organizer and member of the Association. Gebhart said:

"Turk, you remember in 1923 there was a movement to organize a Clerical Employes Association on these Lines. We are now trying to organize a similar organization and would like to know if you will sign up.

Ehlinger, in the presence of the agent, said that he had every reason to believe that this would be the best movement the clerks had ever made; that the management on several occasions had stated flatly that they would not give a raise to the clerks as long as they were represented by the Brotherhood, unless forced to do so, and that then it would not be more than 2 or 3 cents per hour. On the other hand, he had been led to believe that more than 3 cents per hour could readily be obtained through the Clerical Employes Association. Turk replied that he did not feel justified in signing the petition, as he had always favored the Brotherhood and looked to it for betterment of working conditions and wages. Ehlinger then asked what benefits he had ever received from the Brotherhood, and he replied the clerks had received the 8-hour day, vacations, and increases in salaries. Ehlinger then asked if he thought it would be possible to get a vacation if the agent opposed to. He replied he did not know. Ehlinger then asked if the witness thought he could get more money through the Brotherhood than through the Clerical Association. He replied he did. "The conversation lasted perhaps 20 or 25 minutes, during which time Mr. Gebhart and Mr. Ehlinger discussed the matter with me frankly, to the end that they might induce me to sign the petition which they had presented to me." (Affidavit of W. R. Turk; R. 62-64.)

On or about June 5, 1927, a clerk told R. H. Collins and W. E. Valentine to report to the agent in his office. They there met F. C. Ehlinger and the agent. Ehlinger stated he wished to talk to them about "this raise." He presented a petition to the effect that they desired to renounce representation by the Brotherhood and support the Clerical Employes Association, and requested that they sign. He attempted to persuade them to sign, stating, as an inducement, that he was in position to know that the Company would grant a greater pay increase through the Association than could be obtained by the Brotherhood. During the conversation the agent asked Valentine if he had ever misled him or had ever given him bad advice, and suggested it was to their interest to take his advice in this instance and sign the petition. The conversation lasted 10 or 15 minutes, "during which time the plain intent of their statements was to the effect that they desired us to sign the petition which had been presented." (Affidavit of R. H. Collins; R. 64-65).

By C. E. Armstrong, Assistant Agent, Local Freight Office, at Houston, Texas, all on or about June 10, 1927, during business hours:

A. R. Campbell, a clerk, was approached by Armstrong, who handed him a petition which he casually glanced at, but did not read, handing it back without comment, merely shaking his head as an indication that he did not care to sign. Armstrong said: "The tell me they have $75,000. with which to give the clerks an increase in wages, and they say that they are not going to give a cent through the Brotherhood." (Affidavit of A. R. Campbell; R. 48-49).

Armstrong approached J. G. Miller with a petition and said in effect:

"The Railway Company has $75,000. to give the clerks when represented by an organization other than the Brotherhood, but they will not give an increase in pay through the Brotherhood."

"I did not read the petition and told Mr. Armstrong that the Brotherhood had represented me since 1920, and they will represent me eight more years if I still remain in the railway service." (Affidavit of J. G. Miller; R. 49-50).

He said to L. L. Ellis, in effect:

"The Company has said if they could obtain 51 per cent of the clerks, they would grant an increase in wages, but would not grant an increase through the Brotherhood."

Witness replied he did not think he would get in on it. Armstrong made no further remarks. (Affidavit of L. L. Ellis; R. 52-53).

He gave B. G. Hudson, a clerk at the local freight office, a petition to read over and sign. Witness does not recall the exact wording of the petition, but it was to the effect that the undersigned desired to be represented by a Clerical Association, and by so doing would be granted an increase in wages. (Affidavit of B. G. Hudson; R. 53.)

He presented a petition to J. A. Ward, reading substantially:

"We, the undersigned, do hereby petition the management to revive the organization known as the Association of Clerical Employes and handle through its officers all grievances now pending in preference to officers of the Brotherhood," and made a statement to the effect:

"I do not know much about this, only what they tell me, but they say the Company has $75,000. with which to give the clerks an increase in wages, but they will not give an increase through the Brotherhood."

Witness returned the petition with the statment he did not care to sign it. (Affidavit of J. A. Ward R. 54-55.)

He approached J. D. Guidry with a petition, which the latter glanced over but did not read closely enough to remember the wording of it, saying in effect that the management has $75,000. with which to give an increase in wages provided 52 per cent of the clerks' signatures are secured, and that no increase will be granted through the Brotherhood. Witness asked why the management had not offered that proposition before the clerks had filed a request for an increase. Reply was made that he was not open for argument. Witness then declined to sign the petition. (Affidavit of J. D. Guidry: R. 57-58.)

He presented a petition to B. Farris, the contents of which the witness does not recall, asking how he would like to have a little raise in wages. Witness replied he would like to have it, but did not care to sign the petition. Armstrong stated the only way they could possibly get the raise in wages was through signing the petition; that the management would not give a cent through the Brotherhood. Armstrong then asked witness the reason for not signing, and was told he doubted their sincerity in the matter. (Affidavit of B. Farris: R. 59).

He approached J. W. Wade with a petition. Wade told him before reading it that he was not interested. Armstrong, nevertheless, said he understood the management had $75,000. that they would divide among the clerks in Texas and Louisiana, but they would not grant a raise through the Brotherhood. Witness returned the petition, saying he was not interested. (Affiadvit of J.

W. Wade; R. 60.)

He approached A. B. Nias with a petition which witness did not read, stating he had been informed that if he secured a majority of the employes on the petition the management had $75,000. for them and he understood it would not give a nickel through the Brotherhood. (Affidavit of A. B. Nias: R. 61.)

E. L. Griffith, a clerk, was approached with the statement he had a petition which witness could look over and sign. He further said that the management had said they would not give the clerks a "d—n" cent through the Brotherhood, but have $75,000. in the treasury ready to be distributed as an increase in pay among the clerks if they want it. He then handed the witness the petition to read. Witness called his attention to the fact that the petition made no mention of the $75,000. and said he did not like to sign anything until he knew something about it. Armstrong replied that he knew nothing about it except what had been told him; that he had been asked to pass the petition around. Witness then asked how long they had had the money in the treasury, why they had waited until now to say anything about it, and why they wanted the petition signed in order to get it, knowing full well that the clerks wanted a raise and had been after it for two years. Armstrong said in answer:

"It is just like I said. I know nothing about it, except what I have been told. I have been asked to pass it around and that is what I am doing."

Witness stated he did not want to sign the petition and handed it back. (Affidavit of E. L. Griffith: R. 411-412.)

C. A. Brandin was approached by Armstrong and Chief Clerk T. D. Elam. Armstrong said in substance:

"Old man, I know what I am up against, but I was told to circulate this petition and I am obeying instructions."

Brandin replied he was glad to know he had been made to do it, because he thought he was too much of a man to do it on his own initiative. Armstrong then said he was advised the Company had $75,000. to distribute among the clerks if 51 per cent would sign the petition which he held in his hand, authorizing the Association to represent them in matters now pending, but that the Company would not give the clerks a penny through the Brotherhood. Brandin replied that he listened to "their persistent refusal of our request for an increase for two years and that if we could not get an increase through a legitimate organization that he was willing to continue at present rate of pay." "I am the regularly elected and duly authorized Division Chairman of the Brotherhood for the Houston Terminal Division." (Affidavit of C. A. Brandin: R. 412-413.)

At the hearing on the merits the same evidence was introduced (R. 635-638, 670, 678-694, 704-725), and the following in addition:

C. E. Armstrong:

Was formerly Assistant Agent of respondent Railroad Company at Houston, but is no longer in the service. Had general charge of the local freight office under the Agent. Asked various employes to sign a paper or authorization in favor of the Association substantially as they testified. As far as he knows he asked everyone employed to sign such petitions, having been instructed to do so by E. A. O'Donnell, his Superintendent, on some date not now recalled. Approached approximately 92 employes, 8 of whom signed, the others refusing (R. 727-735).

The position of petitioners in the matter is disclosed by the affidavit of J. G. Torian, Assistant to the Vice

President and General Manager, as follows:

"The plaintiff, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes Southern Pacific Lines in Texas and Louisiana, was first officially recognized as an organization representing railway clerks employed by Texas and New Orleans Railroad Company and other Southern Pacific Lines by virtue of Supplement No. 7 to General Order No. 27 of the Director General of Railroads, which was effective on September 1, 1918.

"Said organization originally claimed to represent, or have the right to represent, all clerical employes of the Southern Pacific Lines in Texas and Louisiana, all said lines now being leased and operated by Texas and New Orleans Railroad Company but since the termination of Federal Control of railroads it has been determined that said organization has not the right of representing, and it does not now pretend to represent, any of the clerical employes in the general offices at Houston, Texas, or New Orleans, Louisiana, and falling within said classification. There are now employed on the lines operated by Texas and New Orleans Railroad Company approximately 1,855 clerical employes, exclusive of the general office enployes, hereinbefore referred to, and an organization known as Association of Clerical Employes, Southern Pacific Lines in Texas and Louisiana, which is a voluntary association, claims to represent a majority of said employes under written authorizations from such majority. This organization is hereafter referred to as 'Association." The complainant in this proceeding is hereinafter referred to as 'Brotherhood.' The Brotherhood also claims to represent a majority of said employes. The officers of the association have tendered to affiant, in his official capacity, written authorizations claimed to be held by the association of a majority of the said clerical employes, but affiant, acting for Texas and New Orleans Railroad Company, has declined to receive or act upon the same until a certain pending request for certain changes in rates of pay, made made by the Brotherhood and recently the subject of mediation between said railroad company and asid Brotherhood, shall have been disposed of or dismissed by the United States Board of Mediation, represented in this matter by Hon. Pat M. Neff, a member of said Board.

"When the said pending matter shall have been disposed of or dismissed by the said United States Board of Mediation, it is the purpose of affiant to consider the said request and the said alleged authorizations of the association and thereupon to treat with and to consider, as representatives of the clerical employes of Texas and New Orleans Railroad Company, said organization, provided it shall have authority to act for and to represent a majority of its clerical employes. Said Brotherhood has no contract or agreement whatsoever with said Texas and New Orleans Railroad Company, nor have the clerical employes, other than the general office employes of said railroad company any contract or contracts whatsoever with it, save and except certain memoranda bearing date July 1, 1922, (marked 'Exhibit No. 1' R. 419-429.) and May 16, 1924, (marked 'Exhibit No. 2,' R. 429-430.) and said Texas and New Orleans Railroad Company has no purpose or intention to suspend or modify any of the rules set forth in said documents save and except by agreement with the representatives of its said clerical employes or save and except as it may be authorized by law, and this irrespective of whether the Association or the Brotherhood shall hereafter represent said clerical employes. Said Texas and New Orleans Railroad Company has never recognized the Brotherhood as the representative of its said clerical employes save and except as required to do by decisions of the United States Railroad Labor Board No. 1971, rendered December 21, 1923, and No. 2138, rendered February 21, 1924, and it is not, and has never been, the purpose or intent of said railroad company, or its predecessors in the ownership or control of the properties now operated by the railroad company, to recognize or deal with said Brotherhood, except as required to do so by the decisions aforesaid, which will be of no further force or effect in the event the said association shall present to said railroad company evidence that it is authorized to represent a majority of the said clerical employes; that while it is provided in the rules hereinbefore referred to that should either the employes or the management desire to revise or modify the same, thirty days' written advance notice containing proposed changes, shall be given and conference shall be held immediately upon the expiration of the said notice, it is not provided in said rules, and has never been agreed upon by the railroad company, that the Brotherhood shall continue to represent the clerical employes for any period whatsoever after they may have ceased to represent a majority of the clerical employes.

"The Brotherhood has at all times been extremely radical in its attitude and has made and presented many unreasonable demands on the railroad company and, while its officers have conducted themselves, and still conduct themselves, as acutely hostile to the interests of the railroad company, the railroad company has not undertaken to cause the formation of the Association and has never interfered with, influenced or coerced, or attempted to interfere with, influence or coerce the clerical employes with respect to membership in either the Brotherhood or the Association. Many of the officers and employes of the railroad company, and particularly the officers and employes the work of whose departments or stations is most directly affected by loyalty, industry and interest in the welfare of the company on the part of clerical employes, other than those in the general offices, have a strong interest in the selection by said employes of an organization to represent them which will endeavor, as they believe and as affiant believes the association will do, to cooperate with their employer and to deserve rather than to demand, without deserving, favorable action in the matter of wages and working conditions. Nevertheless, most of said officers have not infered, by word or deed, between the Association and the Brotherhood in the efforts of both to secure members or authorizations to act for employes. Several of said officers and employes have and, unless and until it shall be declared unlawful for them to do so (as affiant believes) intend to continue by advice, reasonable argument and persuasion to present to said employes the advantages, as they see it, of said employes being, becoming or remaining members of the Association rather than of the Brotherhood, and beyond this no officers of the railroad company have gone or, as affiant is informed and verily believes, intend to go or will go. The officers who have so acted are not above the rank of assistant superintendent and the employes not above the rank of agent.

"Said railroad company has not interfered and, as affiant believes, does not intend to interfere, one way or the other, in the action or nonaction of any of said officers and employes.

"Affiant denies that any coercion whatsoever has been used by any officers of the railroad company with respect to the matters herein contained or any other matters affecting the relations between the railroad company and its said clerical employes.

"Affiant wrote and transmitted to the parties addressed letters in substance as set forth on pages 23, 24 and 25, (R. 31-34), of the bill of complaint filed herein. Said letters were intended to be made public by the parties to whom they were addressed for the purpose of contradicting and counteracting numerous erroneous statements of fact which were persistently made and circulated by the Brotherhood and its officers. Said letters correctly set forth the facts and, in somewhat general terms, the intentions of affiant and of the railroad company in this matter.

"It is not a fact that, should a majority of the clerical employes of the railroad company, other than those in general offices, elect to be represented by the Association and should affiant and the railroad company deal with the association and not with the Brotherhood, the clerical employes now members of the Brotherhood will be forced to withdraw from member-

> ship therein or that the Brotherhood will, of necessity, be dissolved. In fact, any employe of the railroad company may be a member of any organization irrespective of whether the railroad company has contracts or deals with said organization or not.
>
> "With respect to the allegation in the bill of complaint alleging refusal to issue passes to a nominal employee on the alleged ground that he is a member of the Brotherhood: No employe has been refused passes because of membership in any organization, the Brotherhood included, but the issuance of passes is a matter of grace and is properly dependent, to a certain extent, on the nature of the work, satisfactory or otherwise, of the employe requesting such favor and, in fact, the general rules of the railroad company with respect to passes provide that officers will decline to issue passes for employes who have not shown zeal in the discharge of their duties." (R. 413-419.)

The facts with respect to the Association, its purpose and activities appear from the affidavit of F. C. Ehlinger, as follows:

> "I have been in the service of Texas and New Orleans Railroad Company and other Southern Pacific Lines for fourteen years, beginning November, 1913, as Construction Timekeeper. I am now Chief Clerk in the Superintendent's office at Ennis, Texas.
>
> "I am a member and am General Chairman of the Association of Clerical Employes, Southern Pacific Lines in Texas and Louisiana.
>
> "I am familiar with the history of said organization and with its purposes. Said organi-

zation had its origin in March, 1923. In a letter written by me to the Chief Clerks of the various superintendents of the Southern Pacific Lines in Texas and Louisiana I proposed an organization of members of personal office forces and division office clerks, including division accounting bureau, dispatcher's office, division engineer's office and master mechanic's office, to the end that we might deal with the management in the matter of rates of pay, working conditions, etc., wholly separate and apart from the organization of Brotherhood of Railroad Clerks, whih which I was dissatisfied and with which I was advised many others were dissatisfied, it being my view and the view of many others that a less radical organization was extremely desirable and that cooperation with the officers of the company rather than antagonism was desirable. Practically one hundred per cent of the clerical employes within the limits above mentoned became members of the proposed organization, which communicated the fact of its formation and purposes to the management of the company. We were then informed by Mr. J. G. Torian, assistant to the vice-president and general manager, that under the law the management was compelled to deal with all clerical employes, outside of general office forces, as one class, and could not deal with the forces in the superintendents' offices separately from the station clerks and other clerical forces. As a result of this advice we, that is, the members of the organization referred to, undertook to extend, and did extend, the membership to all clerical employes on the Southern Pacific Lines in Texas and Louisiana, outside of and except general office employes, that is, employes in the general offices of the company at Houston and at New Orleans.

"We secured a large membership, amounting to a substantial majority of all employes of the Southern Pacific Lines in Texas and Louisiana entitled to membership, and we thereupon requested the management of said Southern Pacific Lines and of said Texas and New Orleans Railroad Company to recognize our organization as the organization representing a majority of such employes. The management in view of the declared policy of the United States Railroad Labor Board in such matters, caused a secret ballot to be taken of the clerical employes, outside of general office clerks, to determine whether they wished to be represented by the Brotherhood of Railway Clerks or the Association of Clerical Employes, Southern Pacific Lines in Texas and Louisiana. There were a total of 1,635 such employes entitled to vote. Of these 1,073 voted, of whom 611, by their ballots, favored the Brotherhood of Railroad Clerks and 462 favored the Association of Clerical Employes. The question whether this ballot should override our majority of the signed authorizations went before the United States Railroad Labor Board and was decided on September 21, 1923, by Decision No. 1921 of said Board, that the majority of the ballots cast would control.

"Accordingly, said Brotherhood of Railroad Clerks continued to represent the clerical employes, outside of the general offices, and the association became dormant. Nevertheless, the extremely radical character of the Brotherhood of Railroad Clerks remained exceedingly distasteful to me and to many other of the clerical employes of the Southern Pacific Lines and we have, accordingly, determined to revive, and have revived, the Association of Clerical Employes, Southern Pacific Lines in Texas and Louisiana, which is now an active organization.

"I am not an official of Texas and New Orleans Railroad Company or of the other Southern Pacific Lines in any sense and am eligible to membership in either of the organizations above referred to. My activity in the revival of and securing members for said Association is purely personal and is not at the direction or suggestion of any officers of said Texas and New Orleans Railroad Company.

"I have seen the affidavits of W. R. Turk and of R. H. Collins, employes in the Local Freight Office of said Texas and New Orleans Railroad Company at Dallas, attached to the bill of complaint filed in this suit, and while, with a few exceptions, they are substantially correct, they require the explanation that neither of said parties is subordinate to me and the statement of W. R. Turk to the effect that he is subordinate to me is not in accordance with the facts.

"Reference made by me to the question of vacation was for the purpose of drawing out from Turk the fact that, notwithstanding the fact that provisions for vacations promulgated by the United States Railroad Labor Board are now contained in the rules, the agent has a great deal to do with determining whether or not a vacation may be taken by any particular man or at any particular time.

"I did not state to either of said parties that I had any assurance, direct or indirect, that the

Association would obtain increases in pay, but I did state that I believed, as I do in fact believe, that the Brotherhood of Railway Clerks has a membership paying dues of only about 20 per cent of the total employes of these Lines entitled to membership, and that because of the small number of employes really represented, and because of the radical and arbitrary methods adopted by said organization in attempting to deal with the Railroad Company, it would not be able to get any substantial pay increase or other benefits from the Company, except perhaps by appeal to the highest tribunal, whereas I believed, and do believe, that the Association, approaching the matters referred to in a spirit of co-operation, would be able voluntarily to obtain benefits for the employes which the more radical organization could not obtain. I also told all employes with whom I talked that I wished them to forget that I was Chief Clerk to the Superintendent and to regard me simply as a clerical employe on the division who was attempting to benefit all employes in that capacity, and, finally, that I wished them to act on their own judgment—that if they really favored the Brotherhood of Railway Clerks, I did not want them to sign, but if they really did not favor the Brotherhood of Railway Clerks, that I hoped that they would become members of the Association.

"With respect to interviewing clerks during office hours: This has also been frequently done by officers of the Brotherhood of Railway Clerks particularly by General Chairman H. W. Harper, of that organization." (R. 431-434.)

To substantially the same effect is the testimony of Ehlinger, (R. 735-764), Douglas D. Wade, (R. 1021-1031), C. W. Derrington (R. 1032-1036), and J. C. McDaniel (R. 1036-1065), at the hearing on the merits.

8. Prior to the filing of the original bill, the Association had had a meeting of representatives who had been elected and selected by the clerks on the various divisions of the Railroad, had effected a reorganization, and had elected officers (R. 527, 737-738 and 982-985), through whom it had requested that the Company recogonize their organization as representative of the clerks; but it had been put off because of mediation proceedings between the Brotherhood and the Company, with the assurance, of which the court was advised at the hearing of the application for a temporary injunction, that they would be received when the pending mediation had been terminated. (R. 415.)

On August 5, 1927, the Association again tendered the Company the authorizations collected by it. These were received, counted and checked against the records of the Company. Approximately eighty were thrown out because signed by laborers, freight truckers, and porters; two because they were signed by agents, and others were disregarded because of duplications (R. 523-524, 535-551.) It was found and determined that said authorizations were from a majority of the approximately 1,855 clerical employes. There is in the whole record not the least evidence of any lack of good faith in the count and consideration of these papers.

On the contrary the whole record shows that theofficers of the Railroad Company, knowing of the reorganization of the Association, that delegates had been elected, and had in turn elected officers, and having the right to take the word of said officers as to who they represented, required their written authorizations to be produced, rejected many of them, and extended recognition to it only after a careful check and count of these papers, to determine the number of signers. (R. 535-551.)

Forms of the letters of authorization appear on pages 460 to 467 of the Record.

It is not believed that the form of these authorizations or the various objections interposed by the Brotherhood against the right of the employes who signed them to be considered clerks or to become members of clerks' organizations are material, it being in any event sufficient that the officers of the Railroad should believe, as they did, that the Association was fairly entitled to speak for the employes, or a substantial number of them. Petitioners have, nevertheless, prepared an analysis of the objections made by the Brotherhood and of the facts with respect to them and annex it to the brief as Appendix B.

9. Torian, by whom and under whose direction, the authorizations of the Association had been examined, checked and counted, on August 6th, 1927, addressed the following letter to the Association:

> "The authorizations which your committee hold to represent the clerical employes, other than General Office employes on these Lines, that were presented to me at our conference yesterday as your authority for seeking conference with me have been carefully checked and in view of these authorizations and under Rule 56, Section (a) of the rules promulgated by the Railroad Labor Board, reading as follows:
>
> " 'Where the term "duly accredited representative" appears in these rules it shall be understood to mean the regularly constituted committee representing the class of employes on the railroad where the controversy arises, or any representative or representatives the employes directly interested may select or designate.'

> "These Lines will recognize your committee as the representatives of the employes directly interested." (R. 96.)

On August 9th, 1927, Torian wrote to the various Division Superintendents of the Railroad:

> "For your information and guidance I attach copy of my letter of August 6th addressed to General Chairman Ehlinger of the Association of Clerical Employes advising that these Lines will recognize his committee as the duly accredited representative of the clerical employes of these Lines other than the General Office employes."

(R. 97.)

These were made public in the usual course of the business of the Railroad, the Association was accordingly recognized and dealt with as representing the employes, and the Brotherhood, and its officers were not. One of the latter, Harper, was on September 28, 1927, excluded from a meeting of officers of the Railroad with representatives of the Association, which he attempted to attend. (R. 131-134.)

Following the recognition of the Association, its officers pressed for a conference on a wage adjustment. Conferences were had, and on August 20, 1927, an agreement was made and signed, as follows:

"Memorandum of Agreement

between

Texas and New Orleans Railroad
Company

and

The General Committee of the Association of Clerical Employes of the Southern Pacific Lines in Texas and Louisiana, representing the Clerical Employes, other than General Office Employes.

"1. Without otherwise modifying or affecting the existing rules with respect to working conditions of clerical employes of these Lines, other than General Office employes, it is hereby agreed by and between the Company and the General Committee of The Association of Clerical Employes of the Southern Pacific Lines in Texas and Louisiana that an increase aggregating the sum of $100,000.00 per annum shall be distributed by joint action of the representatives of the Company and of the Association of Clerical Employes of the Southern Pacific Lines in Texas and Louisiana in such a manner as to bring about just and equitable rates for the clerical employes.

"2. The adjustments in rates of pay that will be made under the provisions of this agreement will be placed in effect as of August 16, 1927, provided they are worked out in time for the current payrolls. If this is not accomplished, the adjustments covered by this agreement will be put in effect as of September 1, 1927.

"3. This agreement shall continue in force until September 1, 1928, and thereafter until thirty (30) days notice in writing stating the change or changes desired shall have been given by either party to the other."(R. 104-106.)

Promptly thereafter the sum of the annual increase in wages was distributed or prorated among the clerks, in so far as possible "in such manner as to bring about just and equitable rates" of pay—that is in accordance with the work and responsibility of the various positions (R. 176-177, 756), but not, as the Brotherhood had demanded, by a flat increase of so much per hour to all alike, irrespective of the considerations mentioned.

10. During the period of these negotiations in August, 1927, no deduction was made by the Railroad Company from the regular monthly pay of the negotiators for the Association, on account of time so lost by them from their ordinary duties (R. 746-747.) and the one of them, Ehlinger, who was absent from his home, was

allowed and paid his ordinary living expenses, amounting, for 19 days, to $86.10. So also during the months of September, October and December, 1927, and January, 1928, a member of the Association, C. W. Derrington, while absent from his home attending to business of the Railroad, devoted his spare time to securing members for the Association. There was no attempt to make any deduction from his pay on this account, and his total expenses for the four months, amounting to $51.70, were paid by the Company (Photostat exhibits between pages 1020 and 1021 of the Record.)

On September 6, 1927, two clerks employed at Houston Freight Station, C. A. Brandin and E. L. Griffith, in company with the General Chairman and General Secretary-Treasurer of their organization, the Brotherhood, called on the Executive Vice President of the Railroad and demanded that he require Torian to reverse the action theretofore taken in recognizing and dealing with the Association, and cause the Brotherhood to be reinstated as recognized representative of the clerks. While so engaged they were absent from their duties for 4 hours, during which the Company employed no additional help on account of their absence. They were not paid for the time so lost from their duties (R. 157-158).

11. Following the recognition of the Association as representative of the clerks and consequent nonrecognition of the Brotherhood, H. W. Harper, General Chairman, and J. W. Walker, General Secretary-Treasurer, were dropped from seniority rosters of the Company and their privileges as nominal employes were terminated. (R. 138-141.)

The facts with respect to the employment of these men are Harper had been employed by another company as brakeman, and on February 5, 1918, had been discharged for drinking intoxicants. (R. 1085-6.) On the false representation, verified by his affidavit, that he had resigned from his last employment and that he had never been discharged or suspended from any situation except from the Railway Mail Service he was, on February 15, 1918, employed as a clerk by the Railroad Company (photostat of personal record of Harper between pages 1086 and 1087 of Record). About June 9, 1923, he became General Chairman of the Brotherhood and was granted an indefinite leave of absence effective June 15. From this date forward he rendered no service to the Railroad Company and received no pay from it, but was paid by the Brotherhood, to whose interests he devoted his entire time. (R. 812; 848.)

Walker had been employed by The San Antonio & Aransas Pass Railway Company as a clerk, had become an officer of the Brotherhood, to which he devoted his entire time, and was on leave of absence from the service of his nominal employer when, on May 1, 1925, its properties were leased to the defendant, Texas and New Orleans Railroad Company. (R. 801-2.) On August 30th, 1925, he requested of said last named Company an indefinite leave of absence "in order that there will be no question as to my status when I find it necessary to again report for duty." On September 9th his request was granted. (R. 502.) He rendered no service whatever to the Railroad Company, and received no pay from it, but was paid by the Brotherhood, to whose interests he devoted his entire time—except that he was recalled from leave and rendered service from February 7, to March 4, 1927. (R. 885.)

During their leaves of absence the names of both Harper and Wlaker were carried on the seniority rosters of the Company, it being thereby indicated that in the event of their return to the service, their seniority would be deemed to date from the time of their original employment, and to be unbroken. (R. 814-5.)

They were allowed the benefit of the Company's group Insurance, under which employes may, without examination, take insurance on their lives, in an amount not exceeding in round figures a year's wages, the Company paying the premiums on the first five hundred dollars, and the employe, at a very low rate, on the remainder. (R. 813, 876.)

They were permitted by the Hospital Association of the Southern Pacific Lines, which is controlled jointly by the employes and the Company, to share in its benefits, at the rate of one dollar per month, like employes regularly in the service. (R. 813, 877-9.)

Free annual passes were given them, and dependent members of their families were, on reasonable request, usually given free trip passes. (R. 814, 890-902.)

12. R. E. Stotzer was employed by the Railroad Company at Seguin, B. G. Hudson in the freight station and Charles Ginsberg in the shops at Houston, Texas, all as clerks and all at will—that is, each of them, as did their employer, had the right to terminate the employment at any time for any reason or for no reason.

Stotzer, on July 23, 1927, erroneously way-billed a carload of watermelons to Fort Worth, and on July 28, another to Wichita Falls, Texas, whereas both were consigned and should have been way-billed to Wichita, Kansas. The errors resulted in delay and damage, and in payment of claims by the Railroad Company. After payment the claim files were passed to the office of the Superintendent of Freight Claim Prevention, whose duty it was to investigate the cause of damage and to take steps to prevent a recurrence. On October 17, 1927, he advised the Superintendent of the Houston Division with respect to the first shipment and claim, and on October 20, took the same action with respect to the second, requesting return of the papers with advice what corrective action was taken (R. 564-566).

Both letters were forwarded by the Superintendent to the Agent at Seguin for a statement of responsibility and excuse, if any, for the errors. It was shown, and, indeed, not denied, that Stotzer was responsible for both. He was, accordingly, given a hearing and was discharged, the Superintendent testifying: "Because of so many errors of this kind occurring over the Division from time during the past six or seven months resulting in threatened loss of business and heavy claim payments, I deemed it advisable, for the good of the service, that vigorous action should be taken and I, accordingly, directed that Clerk Stotzer should be relieved from the service. The discharge was solely on account of these errors and was not in connection, directly or indirectly, with any activities on his part in this suit or in connection with the Brotherhood." (R. 566-567), Stotzer had made one of the affidavits attached to and supporting the original bill in this suit, the substance of same being set out on page 29. of this brief (R. 65). Stotzer's affidavits confirm the facts stated but he insinuates that because there was nothing else against his record except a reprimand received about 1920 or 1921 he ought to have been more leniently dealt with. He also complains that at his hearing Harper, General Chairman of the Brotherhood, was not allowed to appear for and represent him. (R. 491-4, 673-7).

Hudson, on May 17, 1927, made written request for trip passes for his mother from Laurel, Mississippi, to Houston, Texas, and return, via New Orleans & Northeastern Railroad and the line of the petitioner, representing that his mother was solely dependent on him for support and signing a certificate as follows:

"I make this statement in view of the fact that passes are prohibited by Federal and State laws under penalty of heavy fine against both the Railroad and the party using same, when issued to other than certain excepted classes, and I hereby certify that the above statement is correct, and shows the true circumstances of the person for whom free transportation is desired." (R. 569.)

The New Orleans & Northeastern declined to issue the pass and thereafter an amended request was made via Illinois Central. These passes were duly furnished but through error were good one way only—from Laurel to Houston, without return. On September 3, 1927, they were returned for cancellation accompanied by a request for passes from Houston to Laurel and return. These passes were procurred but were returned September 21, 1927, because they read in the wrong direction. Finally passes as desired were procured and delivered to Hudson in October, 1927, but the considerable correspondence passing with respect to the matter had attracted attention, request made by him was closely examined, and it was found that he had originally stated that his mother was half dependent on him, but had struck this out and inserted the statement that she was wholly dependent (R. 560-562, 568-576). Hudson was charged with attempting to obtain free transportation through misrepresentations and was given a hearing at the office of the Superintendent of Terminals October 27, 1927. He admitted the charge, but alleged that he understood it was customary to make such statements with respect to dependency, irrespective of the facts. Being asked who he wished to represent him, he first named Harper and afterwards Walker, but was advised that they were not in the service and would not be heard (R. 495-498). Hudson had made an affidavit in support of the original bill (This brief p. 32. R. 53.). He made two affidavits with respect to his discharge: One October ber 17, 1927, annexed to the information alleging contempt, that J. C. McDaniel, a clerk and member of the Association, had asked him if he was a member of the Brotherhood, attempted to get him to join the Association and had said that if Hudson and others did not join it would only be a matter of time until a lot of them were let out, to which Hudson replied if that was the case he was the same as out of a job (R. 159-160); the other November 4, 1927, to the effect that he had told McDaniel on the occasion referred to that if the Railroad Company let him out, he could get plenty of other positions. He also testified that the Superintendent, O'Donnell, in the course of the hearing asked him if he did not have plenty of other positions awaiting him and that on being told that he did not then have any, said: "I thought you had plenty of places to work." (R. 495-498). McDaniel's account of the conversation with Hudson is that he had asked Hudson if he was a member of the Brotherhood and had received as a reply 'he did not care to answer that question; he was a free-born American citizen.' McDaniel did not press the question, but walked away (R. 1064). Hudson was given the option of resigning, but, electing not to do so, was discharged for attempting to obtain free transportation through misrepresentation.

Ginsberg made affidavit that on the morning of October 4, 1927, Edgar Garrett, a Local Chairman of the Association, told him that if he did not join it he would be discharged that day (R. 498-9). Garrett positively denied it (R. 551). At noon on that day he asked the head clerk for leave to be about 15 minutes late in returning from the lunch hour, but his request was refused. He said that he was going to take the time off anyway and did so (R. 551-3), His claim is that he told the head clerk he was suffering from toothache and had an appointment with a dentist (R. 498). The head clerk and the chief shop clerk, to both of whom he talked about his desire for the time off, swore that he merely said that he had some important business to attend to

(R. 551-3). He was given a hearing, at which he demanded that he be represented by officers of the Brotherhood and was told that they could not represent him, as the Brotherhood was no longer recognized (R.498-9). His conduct was reported to the Superintendent of Shops, who, because of his insubordination and because, also, he was regarded as incompetent, suspended him and recommended his discharge (R. 554). The General Superintendent of Motive Power and Equipment, to whom the matter was referred in the usual course, approved the discharge and it became effective accordingly. This action was in no way influenced by membership or non-membership to the Brotherhood, the officer referred to having no knowledge as to that. The only matters given consideration were the admitted fact of insubordination, belief that he was incompetent, and the fact that a reputable firm of attorneys had a few days before made written complaint to the Company that Ginsberg had been intrusted with a sum of money by a client of the firm and had embezzled it (R. 554-556.). Insubordination is a common cause for discharge, as proper subordination to duty is considered essential. At least one member of the Association was discharged for substantially the same cause (R. 556-557).

There is not a syllable of evidence that Lull, Waid or Torian had knowledge of or anything to do with the discharge of these men, and there was no denial that they were guilty of the offenses for which they were in fact discharged.

Specification of Assigned Errors to be Urged:

The assigned errors filed in the District Court and intended to be urged are set out at length in Appendix C of this brief, to which petitioners respectfully make reference, and are summarized below:

(1) The Circuit Court of Appeals erred in affirming

the judgments and decree against petitioners because there is no element of unlawful interference, influence or coercion in the case, mere suggestion or advice to employes with respect to organization or selection of representatives not being a violation of the Railway Labor Act of 1926, and because the decisions in this case are contrary to the First Amendment to the Constitution. (This point is germane to the following assignments of error: 53, 54, 55, 56, 57, 58, 59, 63.)

(2) The court erred in affirming the judgments and decree against petitioners because all questions of law in this case have been decided adversely to the complainants below and respondents herein by this court in the *Pennsylvania Railroad Cases*, 261 U. S. 72 and 267 U. S. 203, and on the authority of these cases the bill should have been dismissed. (This point is germane to the following assignments of error: 1, 15, 16, 20, 21, 22, 34, 36, 43, 44, 53, 54, 55, 56, 57, 62, 63.)

(3) The court erred in affirming the judgments and decree against petitioners because the third paragraph of Section 2 of the Railway Labor Act of 1926 confers at most on the parties referred to therein only an abstract right. Representatives, though chosen in conformity with said section of the statute, are given no power to accomplish anything. The statute as a whole negatives any intent to compel conferences and adjustments after representatives are chosen. A court of equity cannot be invoked to determine an abstract right, the enforcement of which could lead to no definite result. (This point is germane to the following assignments of error: 1, 15, 53, 54, 63.)

(4) The court erred in affirming the judgments and decree against petitioners because the orders enjoining petitioners from influencing employes of the company in the selection of representatives and the orders entered in the contempt proceedings for alleged violation of the

temporary injunction are void and, insofar as the Railway Labor Act of 1926 authorizes such orders and decrees, it also is unconstitutional and void. (This point is germane to the following assignments of error: 1, 15, 18, 19, 20, 23, 24, 25, 26, 28, 57, 58, 59.)

(5) The court erred in affirming the judgments and decree against petitioners because Section 52 of Title 29 of the United States Code, which was Section 20 of the Clayton Act, prohibits the granting of an injunction in this cause. (This point is germane to the following assignments of error: 1, 15, 23, 24, 25, 53, 54, 56, 57, 63.)

(6) The court erred in affirming the judgments and decree against petitioners because the recognition of the association by petitioners and the doing of each and all the other things alleged as violative of the temporary injunction were legally justified and were not in violation of the temporary injunction, even though it be conceded that said temporary injunction was lawfully granted. (This point is germane to the following assignments of error: 1, 16, 18, 19, 20, 23, 24, 25, 28, 29, 30, 31, 32, 33.)

(7) The court erred in affirming the judgments and decree against petitioners because the several provisions of the contempt order of February 11, 1928, reaffirmed in the final decree of court, requiring petitioners to disestablish the Association of Clerical Employes as the recognized representative of the clerical employes of the railroad company; to cease to permit officers or representatives of said association to organize, promote, manage and attend to the business of the association or any organization of said clerical employes thereafter formed on the railroad company's time and pay, or at its expense, or under its authority, unless a similar privilege is accorded to the officers and representatives of the Brotherhood; to restore and re-establish the Brother-

hood as representative of the clerical employes; restore H. W. Harper and John W. Walker to the service of the railroad company without prejudice and without loss of seniority rights; to restore to said Harper and Walker pass privileges over the line of the railway company; and to restore R. E. Stotzer, B. G. Hudson and Charles Ginsberg to the service as employes of said railroad company without prejudice and without loss of seniority rights, and make them whole for any losses of pay they may have sustained by reason of their discharge, are unreasonable, arbitrary and oppressive, and are not justified by the pleadings and the evidence and should have been set aside. (This point is germane to the following assignments of error: 18, 19, 20, 23, 24, 25, 26, 29.)

(8) The court erred in affirming the judgments and decree against petitioners because the order of the court bearing date July 29 and filed August 2, 1927, granting the preliminary injunction against interference, influence and coercion of the clerks does not by its terms or by any reasonable intendment prohibit the doing of the acts found by the trial court to have been in violation of said order. The injunction not prohibiting the things done, the punishment is *ex post facto*. (This point is germane to the following assignments of error: 1, 16, 19, 20, 23, 24, 25, 29, 30, 31, 32, 33.)

(9) The court erred in affirming the judgments and decree against petitioners because the court below so framed and interpreted the temporary injunction and so framed the final decree as to keep the petitioners in constant jeopardy of contempt without being able to determine what action, however lawful in itself, they may take in the management and operation of an important instrumentality of interstate commerce, which they are bound by law to operate, without a violation of the injunction. (This point is germane to the following assignments of error: 16, 58, 59.)

ARGUMENT

Petitioners respectfully submit:

1. Mere suggestion or advice by officers and agents of the Railroad to employes with respect to their organization, or selection of representatives is not unlawful, nor violative of the Railway Labor Act of 1925, nor subject to be enjoined.

2. The provisions of the Transportation Act, 1920, including the rules of the Labor Board, which were construed by this Court in the Pennsylvania Railroad cases, 261 U. S. 72 and 267 U. S. 203, are so nearly identical with those of the Railway Labor Act, 1926, that those cases are decisive of every question presented in the case at bar and under the authority of these decisions the complainants' bill should be dismissed.

3. A court of equity cannot be invoked to determine an abstract right, the enforcement of which can lead to no definite result.

4. Insofar as the Statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional and seeks to take away an inherent and inalienable right. The decisions in this case are contrary to the decisions of this Court in Adair vs. United States, 201 U. S. 161, and Coppage vs. Kansas, 236 U. S. 1, and violative of the First Amendment of the Constitution.

5. Section 52, Title 29, of the United States Code, which was Section 20 of the Clayton Act, prohibits the granting of an injunction in this case.

6. The recognition of the Association was legally justified and was not a violation of the temporary injunction which the court had granted, though it be conceded for the sake of argument that the injunction was lawfully granted.

7. The contempt order which the court entered

broadens the injunction and in a purely retroactive way condemns and punishes for things that the injunction did not prohibit. In adjudging the defendants guilty of contempt for the things denounced in the contempt order the court is extending, amplifying and enlarging the injunction, and insofar as it does so the punishment denounced in the contempt order is *ex post facto.*

8. Retention of officers of the Brotherhood on seniority rosters while devoting their entire time to their organization, and granting them free passes and other gratuitous benefits were mere favors, revocable at the pleasure of the employer. Their revocation was in the exercise of constitutional rights of the employer and its officers, and the order of the District Court requiring their continuance deprived petitioners of their property without due process of law, and of the equal protection of the laws. The Court had no power to restore a status resting on no legal right.

9. Discharge of employes, for causes wholly disconnected with the labor dispute, and necessary, in the opinion of supervising officers of the Railroad, in the maintenance of discipline was not and could not be a violation of the injunction against interference, influence and coercion in their right of organization and selection of representatives. The Railroad has the right to discharge employes for any cause, or (though it does not exercise it) for no cause. The order of the District Court, requiring the restoration of the discharged men to the service with pay for time lost deprived petitioners of their property without due process of law and deprived them of the equal protection of the laws.

10. The injunctions, temporary and perpetual, are framed in such general language, and so interpreted and enforced by the District Court, that they keep petitioners in constant jeopardy of contempt, with no basis for determining what action in the management and

operation of the railroad may be a violation of the injunction.

I.

Mere suggestion or advice by officers and agents of the Railroad to employes with respect to their organization, or selection of representatives is not unlawful, nor violative of the Railway Labor Act of 1926, nor subject to be enjoined.

The suggestions made by an assistant superintendent, an agent, and an assistant agent to one clerk at Seguin, two or three at Dallas, and ninety-two at Houston that it was probably to the best interest of the clerks to choose the Association as their representative rather than the Brotherhood, unsuccessful, except in the case of eight clerks at Houston, and all made on the Company's time for which it was paying the clerks, speak for themselves. They are set out with what is probably tedious detail on pages .. to .. of this brief. It is submitted that there is in them no element of coercion, improper interference, or undue influence, but that they are such that any employer or agent of an employer may, with perfect propriety and legality, make to any employe. Indeed, it is believed that the right to make such suggestions is an inalienable incident of the right of free speech guaranteed by the First Amendment ot the Constitution of the United States: "Congress shall make no law * * * abridging the freedon of speech * * *"

If this constitutional provision means anything, it means that an employer and its officers and agents have the inherent and constitutional right to converse with and communicate to employes the wishes of the employer, its officers and agents, and to direct such employes as to the desires and purposes of the employer and its representatives in the conduct of the employer's business and in the line of the employe's relation to the employer. Any Act of Congress or order of court which prevents or tends to prevent the free exercise on the part of the employer of such rights contravenes the inherent right of the employe, as in an individual, to have and receive such suggestions and directions, as well as the constitutional right of the employer to give them. If the Act of Congress involved in this case and under which the District Court acted attempts or purports to confer any such power as the District Court and the Circuit Court of Appeals have asserted, then it is an unconstitutional interference with the right of free speech and of free communication betwen employer and employe.

In the event a statute is susceptible of two constructions, the one constitutional, the other unconstitutional, it is unquestionably the duty of the courts, in construing such statute, to give it the constitutional construction. Accordingly, the words of the third paragraph of Section 2 of the Railway Labor Act, 1926, should be held to mean violent or unlawful interference, undue or unlawful influence, or coercion in its legal sense, and not to forbid the exercise of constitutional rights. In support of the foregoing we respectfully refer the Court to its own decisions in *Coppage v. Kansas*, 236 U. S. 1, in which it was held that while intimidation is unlawful, a state may not declare an act intimidation which is in fact not intimidation, and may not forbid such act; and in *Adair v. United States*, 208 U. S. 161, in which it was held that the same limitations are imposed on the United States.

II.

The provisions of the Transportation Act, 1920, including the rules of the Labor Board which were construed by this Court in the Pennsylvania Railroad Cases, 261 U. S. 72 and 267 U. S. 203, are so nearly identical with those of the Railway Labor Act, that those cases are decisive of every question presented in the case at bar and under the authority of these decisions the complainants' bill should be dismissed.

In order to understand the extent to which the cases cited above are applicable to the case at bar, it is necessary to make a comparative study of the Transportation Act, 1920, and the present statute. The purpose of both statutes was the *settlement of disputes* by *agreements* arrived at in *conference*. In the event the parties should fail to agree, then under the former statute the matter went to the Labor Board. Under the present statute, boards of adjustment are to be set up by agreement, and for fear that they should fail, a board of mediation is provided, and if any controversy should not be settled by conference or by the adjustment board, or through the board of mediation, then an optional arbitration is provided. The machinery of the present statute is more complex than that set up in the old Act where the dispute was supposed to be settled by the Labor Board. But the preliminary steps looking to the selection of representatives, conferences and agreements, are substantially the same in both statutes.

Act of 1920.	*Act of* 1926.
Sec. 301. "It shall be the duty of all carriers and their employes * * * to exert every effort to avoid inter-	Sec. 2. "It shall be the duty of all carriers to exert every reasonable effort to make and maintain agree-

ruptions growing out of disputes.	ments, etc.,in order to avoid interruptions. * * *"
Sec. 301. "All disputes shall be considered and if possible decided in conference between representatives designated and authorized to confer."	Sec. 2. "All disputes between a carrier and its employes shall be considered, and if possible decided with all expedition in conference between representatives designated and authorized to confer.
Rule 5 of the Labor Board: "The right of an organization to act through representatives of *its own choice* shall be agreed to by the management." Rule 15 of the Labor Board: "The majority of any craft or class of employes shall have the right to determine what organization shall represent its members. Such organization shall have the right to make an agreement which shall apply to all employes in such craft or class."	Sec. 2. (3rd par.). "Representatives for the purposes of this Act shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other."
(Act of 1920: U. S. Code, p. 1450, Sec. 132; c. 91, Sec. 301, 41 Stat. 469.)	(Act of 1926: U. S. Code, p. 2105-6, 152; c. 347, Sec. 2, 44 Stat. 577.)

The above is a parallel of the preliminary provision of both statutes, and we submit that their terms are substantially identical.

Under Section 308 of the old statute the Board "***may*** *make regulations necessary for the efficient execution of the functions vested in it by this title.*"

Rules 5 and 15 were promulgated under this section. A rule promulgated by a statutory board with express authority to make rules has the same force as if the rule were written in the statute. *United States v. Grimaud*, 220 U. S. 506; *United States v. Foster*, 233 U. S. 515; *Sawyer v. United States*, (C. C. A. 2, 1926) 10 Fed. 2, 416; *Peterson v. United States*, (C. C. A. 9, 1923) 287 Fed. 17; *C. B. & Q. R'y* v. *Frye-Bruhn Co.*, (C. C. A. 8, 1911) 184 Fed. 15; *Tingle v. Hiner*, 17 Fed. 2, 522; *Fowler v. United States*, 11 Fed. 2, 895; In Re Aliens, 231 Fed. 335. The present act provides that representatives for the purpose of the conference at which disputes are considered are to be chosen by each party without interference, influence or coercion by the other party.

Under Rules 5 and 15 of the Labor Board it was mandatory that the management *should agree* that organizations of its employes should speak through representatives *of their own choice*—selected by a majority. Representatives of their own choice are necessarily those selected without interference, influence or coercion.

The plaintiffs' bill in the Pennsylvania case, 267 U. S. 203, charged that the railroad company and its officers *had conspired* to defeat the statute and deprive plaintiffs of their statutory rights of proper representation, stating in much detail the wrongful acts complained of, and they are the same kind of acts which the complainant avers in the case before the court. They attacked the wage agreement made between the company and the "company union," just as plaintiffs do in our case. The prayer of the bill in that case was for decree enjoining the defendant from enforcing the provisions of the wage agreement; from enforcing any change of rules as they existed under the old agreement; *from continuing to deal with the company union*; *from financing, interfering* *with, directing and controlling its employes and from refusing to confer and deal with the complainants' Federation No.* 90, which represents the great majority, etc.

The bill in our case after a long historical statement in which the origin of the Brotherhood and its prior recognition by the company is averred, charges (Original Bill, R. 27; Amended Bill R. 332), that the defendant and its officers (naming them) *unlawfully conspired* and undertook and instigated and encouraged the formation of the so-called company union for the purpose of interfering with the Brotherhood * * * in an effort to supplant it as the accredited representative of the employes.

The prayer for relief in the bill before the court asks that defendants be enjoined from interfering with plaintiffs in the selection of representatives, *from recognizing the association, from permitting the company officials to aid in the organization of the association,* from withdrawing recognition from the Brotherhood, and from discharging Brotherhood men.

It will be seen that under statutes almost identical the plaintiffs in each case, upon similar averments, sought the same relief.

The holding in that case was in effect that though the statute *imposed* a duty to settle disputes by conferences between representatives designated to confer, yet—

> "The statute does not require the railway company to recognize or to deal with, or confer with labor unions. It does not require employes to deal with their employers through their fellow employes. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory co-operation, *and leaves it to the two sides to accept or reject the*

decision. The statute provides the machinery for conferences, the hearings, the decision and the moral sanction. * * * *But there is nothing compulsory in the provisions of the statute as against either the company or the employes upon the basis of which either acquired additional rights against the other which can be enforced in a court of law.** * * (267 U. S. 215).

"The so-called mandatory language of Section 301 might, *if that section were accompanied by a penalty for its violation or some other means of compulsion,* * * * be given the force of a statutory obligation of the parties to a dispute. * * * But when the statute is taken as a whole it may be searched in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated *were in any way to be forced into compliance* with the statute or with the judgments pronounced by the Labor Board. * * * It was not the intention of Congress to provide a remedy in court by injunction.

"*The ultimate decision* of the Board, it is conceded, is not compulsory, and no process is furnished to enforce it, *but it is urged that the preliminary steps are not the final decision,* and it will make the Act meaningless and wholly ineffective if under the Act the parties may not be forced to a conference and to a contest before the Labor Board. This very point was considered by us in the Labor Board Case, and we held that the questions how the representatives of each side should be selected and whom the Board

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Note: Italics are ours in all quotations from statutes and decisions.

should recognize as accredited representatives were of primary importance affecting the working conditions of the railroad. * * * *The same sanction, therefore, of publication and public opinion exists to protect these steps, and nothing more.* (267 U. S. 216.)

"Appellants charge that the company is attempting by threats to discharge its employes, to secure their consent to the agreement of July. All these things it might do and remain within its strict legal rights. We do not think Congress, while it would deprecate such action, intended to make it criminal or legally actionable. Therefore, the bill of complaint does not aver a conspiracy, and without that, equitable relief cannot be granted." (267 U. S. 217.)

Note the many provisions of the old Act which are held unenforceable:

1. It *shall be* the *duty* of carriers and their employes to exert every effort to maintain agreements. But the court cannot compel them to confer or agree.

2. All disputes *shall be* considered and decided in conference, if possible. But the court cannot compel the parties to consider or decide.

3. Such conferences *shall be* by accredited representatives. But the company may refuse to recognize or confer with Federation No. 90.

4. The management *shall agree* to deal with representatives of their employes' *own choice*. But this does not compel the company to recognize Federation No. 90 or prevent it from dictating to or influencing its employes in the selection of other representatives.

The proof in that case showed in substance that Federation No. 90 was an organization of defendant's shop employes affiliated with the American Federation of Labor and, under Federal control, it had been the representative of all such employes. After the termination of that control a controversy arose in which the Federation claimed the right to continue this representation but the Company refused to confer with it on the ground that it did not represent the majority of the shop employes. A ballot was proposed, but the parties could not agree on its form—the Company insisting that natural persons, bona fide employes, be balloted for in a choice of representatives—the Federation insisting that under Rules 5 and 15 of the Labor Board they could select an organization to represent them and "that this shall be agreed to by the management." But in the face of these provisions the Railway Company, in an effort to free itself from the domination of the Federation, "proceeded to carry out this plan of selecting employe representatives." It refused to allow its employes to vote for Federation No. 90, and declared the individual representatives elected, throwing out all ballots that had been cast for the Federation.

The Company caused the local Union or organization to be formed to take the place of Federation No. 90, paid its expenses and had its officers placed on the Company payroll, and having thus set up the local Union made an agreement with it.

Counsel conceded in that case as they must do here—

> "*That the ultimate decision of the Board is not compulsory and process is furnished to enforce it.*" (267 U. S., bottom of page 216.)

But—

> "They are urged that *preliminary steps* are not the final decision, and it would make the act meaningless and wholly ineffective if the parties may not be forced to conference and to a contest before the Board." (P. 217.)

In reply to this contention this Court said:

> "This very point was considered by us in the

> Labor Board case, and we held that the questions *how* the representatives of each side should be selected and *whom* the Board should recognize as accredited representatives were of primary importance and such decision therefore must be regarded, although preliminary, as of the same class of decisions as those with respect to wages and ultimate working conditions. *The same source therefore of publication and public opinion exists for them and nothing else.*" (Page 217.)

This is not dictum. It is the direct decision of the vital question presented in that case, namely, can the court compel the observance of preliminary steps, including the selection of representatives, when it concededly is without power to compel the ultimate steps. Counsel there sought to make a distinction between these preliminary steps and the ultimate step, holding that these first steps were mandatory. That how the representatives should be selected and whom the Board should recognize was a matter that the courts could enforce even though they could not enforce the ultimate provisions of the act. This is the exact contention of counsel in the case at bar. They would have the court enforce the third paragraph of the second section, though they must admit that all of the other provisions of the bill are unenforceable by court decree.

The effort to import some force and dignity to these primary steps, that could not be ascribed to the remainder of the act was so obviously unsound that the court disposed of it in the short sentence quoted above, and it is worthy of note that this decision in all of its parts was without a single dissent.

When we look to the present statute as written we find a scheme for voluntary procedure.

When we examine the Committee Reports and Congressional debates surrounding the origin of the statute this is further shown.

When we examine the old act and its construction by this Court we find a judicial recognition of this fact.

First. The 1926 Statute.

The Second Section defines the general duties of the parties which include the settlement of disputes by agreement, but it was obvious that this might not be accomplished, that the parties might not agree, and Congress being unwilling and the courts without power to make them agree, it was further provided in the Third Section for Boards of Adjustment by which these agreements might be settled.

Congress being unwilling and the courts without power to compel settlement by Boards of Adjustment, the Fourth Section provides for mediation. The mediators have merely visitorial powers. There is nothing in the fourth and subsequent sections with reference to the powers of the Board of Mediation which suggests that Congress intended to force mediation or that the courts could do so—hence the Seventh Section, which sets up provisions for arbitration.

Now, if adjustment under the Third Section, or mediation under the Fourth, had been compulsory, then *arbitration* as provided in the Seventh would be unnecessary. But since the preceding steps were all voluntary it was hoped that through these primary steps the parties could be led to a position where they would arbitrate.

Congress probably had power under the case of Wilson v. New to compel arbitration, but when they approached this topic in the bill such a purpose was disclaimed, for it reads—

> "That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obliga-

> tion imposed upon such party by the terms of this act or otherwise."

Clause by clause we go through the statute and find one voluntary step followed by another, all leading to the final result, a suggested arbitration, and a declaration on the face of the arbitration clause that it is purely voluntary.

So if we undertake to pick out the third paragraph of the Second Section as the one provision in the whole act which may be compelled by court decree, we have the absurd result that such a decree leads the parties up to a climax where either may render empty and meaningless the solemn procedure that has gone before.

The Senator who introduced this bill, the committee that recommended it, and those who discussed and voted for it on its final passage, all understood that Congress probably had the power to compel arbitration of disputes, but with full knowledge of this fact they wrote the declaration in the Seventh Section absolving either party from any obligation to arbitrate. The greater must include the less, and there is no reason in saying that they withheld this pressure in the Seventh Section, intending to apply it with full rigor in the Second.

"*The sanction of public opinion and nothing more,*" was provided for the Second Section, just as it was for the Seventh, and all the intermediate provisions.

Second. The history of the legislation as disclosed by the Congressional Record shows a constant disclaimer of any intention to *compel* the parties to observe any of the provisions of the bill. The Committee Reports disclose that the act was drawn by representatives of the carriers and of the labor organizations. It was stated at a committee hearing on January 15th that it was intended "as a method found by the parties themselves of adjusting labor disputes." (R. 918-919. See Report

Senate Committee on Interstate Commerce, p. 9.)

At page 11:

> "Arbitration is provided in the bill and all the machinery in respect to it is set out. That is not compulsory. The parties may arbitrate or they may not arbitrate, and it requires an agreement between them before they do arbitrate. (R. 958.)

Here is the only place that the court is invited or expected to play any part. If the parties voluntarily arbitrate and have the award of the arbitrators made the judgment of the court as provided in the Seventh Section, then and only then has the court any power to act.

At page 12:

> "There is no doubt about the fact that any offer of mediation can be thwarted by the refusal of the parties to accept the offer of the board to mediate. * * *
>
> "The whole thing is optional. * * *
>
> "I do not see the slightest element of compulsion in it anywhere. * * *
>
> "It is not intended to be a compulsory bill." (R. 959-960.)

At page 30:

> "Both sides have put in this bill every step looking to the adjustment of disputes and the prevention of the stoppage of transportation that can be put in it without bringing in the element of compulsion which none of us at the present time agree on." (R. 960.)

At page 41:

> "The basic value of this proposed legislation lies in its reliance upon the force of contract and not of external compulsion. It is a machinery to promote peace, not a manual of war. Prohib-

> itive commands, fearsome penalties, and threatening gestures, would be entirely out of place and inconsistent with the spirit of the proposed act." (R. 961.)

At page 44:

> "Industrial courts, compulsory arbitration, or forced investigation, have never proved successful, and the framers of this bill had in mind that the moral obligations of the carriers and their employes would do more to assure the success of this kind of legislation than any form of obligation imposed by statute, consequently, it should be borne in mind that the real intention of the parties who have formulated this agreement which is now before you in this bill are willing to accept full responsibility therefore and to see that it is carried out in good faith. It assures industrial peace by right and not by force or might." (R. 961.)

At page 73:

> "There has been a theory of compulsion on the part of a great many people. * * * A great many members of Congress had it. They tried minor compulsions. They realized that there was only one compulsion that would ever work, and that was the ultimate compulsion if they wanted to come to it. And have not these gentlemen practically all abandoned the theory of practical compulsion?" (R. 961-972.)

Many pages of quotations similar to those just made can be found in the Committee Reports that preceded the passage of this bill. (R. 918-962.)

Note the suggestion of Senator Pittman of the committee at page 30:

> "Both sides have put into the bill *every step* looking to the adjustment of disputes without

> bringing in the element of compulsion which none of us at the present time agree on." (R. 960.)

This was a reference to *every step* with a disclaimer of intention for compulsion of *any* step.

At page 73 of the Committee Reports Senator Pittman mentions *minor compulsions* and ultimate compulsions:

> "They tried *minor compulsions*. They realized that there was only one compulsion that would ever work, and that was the *ultimate compulsion* if they wanted to come to it." (R. 962.)

In the face of all these facts this court is asked to enforce a *minor compulsion* when *ultimate compulsion* is expressly withheld.

> "Reports of committees of both House and Senate may be regarded as exposition of legislative intent." (Binns v. U. S., 194 U. S. 486, and cases there cited.)

Third. All questions with reference to the right of judicial interference have been determined in the construction of the Act of 1920 in the holding that the sanction of public opinion and nothing more was provided to safeguard the provisions for the primary steps, just as for the ultimate requirements.

It seems therefore that we have repeated warnings from the history of the former statute, from the decision of this Court in the Pennsylvania case, from the deliberate statements repeatedly made by those who framed and passed this bill, and from the very nature of the bill itself, that the judicial department of the government was intended to have no hand in its enforcement. The only provision for judicial intervention is found in the Seventh Section, where an arbitration decree may be enforced by court process.

III.

A court of equity cannot be invoked to determine an abstract right, the enforcement of which can lead to no definite result.

The aim and only *purpose* of this Act is settlement of disputes by conferences, mediation and arbitration.

The third paragraph of Section 2 speaks of "*representatives for the purposes of this Act,*" and how they shall be chosen.

If the Congress had gone further and made the chief aim of the statute compulsory then there might be an argument that a preliminary step leading to this chief aim was compulsory. But how can it be said that since the chief aim and obvious purpose is left without compulsion that one of the steps leading to this aim is compulsory, when after that compulsion has been exercised to enforce this detail the power of further enforcement to accomplish the ultimate purpose for which this detail was provided is withheld?

The opening phrase of paragraph three of section two plainly negatives any intent of compulsion. The representatives, and the method of their selection, are only "*for the purposes of this Act*"—the general machinery provided by the remainder of the Act is voluntary, and is binding on the parties only after they agree that it shall be. Thus the general machinery of the Act comes into play only after acceptance by the parties—before that time it is of no force between them. Clearly, then, by the express words of the statute, the "representatives for the purposes of this Act" are to be chosen only when the parties have agreed to use the machinery provided by Congress instead of using some other system as Congress expressly authorizes them to do. (Section 3, Subsection 2, of the Act.) But even if this language were not conclusive, the established rules of equity jurisdiction forbid the use of an injunction here.

The government and public are not concerned with *who* shall act as representatives, but in *what* they shall do after they are chosen. The public is not concerned in whether the Association or the Brotherhood is chosen to talk for the employes, but only in having whoever is chosen reach agreements which will keep the peace.

The construction given to the Act of 1920 may be ignored and the same result reached by ordinary rules of statutory construction. We are here concerned with an Act of Congress containing many sections, and it is elementary that each section is to be read in connection with the rest of the Act, and interpreted with due regard to its manifest purpose (Nashville R y. v. Tennessee, 262 U. S. 318, 323), and any construction which would lead to a result at variance with the policy of the legislation as a whole will be avoided. Ozawa v. United States, 260 U. S. 178, 194.

It is not claimed that the Railway Labor Act of 1926 purports to compel parties to agree, but it is contended here that the provisions with reference to the preliminary step of selecting representatives is mandatory and enforceable by court order. It is apparent that the whole purpose of the Act of 1926 was to provide machinery for voluntary settlement of disputes, it being recognized by Congress that compulsion was the best way to *prevent* agreement between parties. Now, if the courts below are right in saying that this preliminary provision is compulsory, the whole intent and purpose of Congress is frustrated, for it is obvious that, as a practical matter, if either party is coerced by a court order with reference to a preliminary step that party most certainly will refuse to go any further at all. It is admitted that neither party can be compelled to go further and to agree, and to hold that the first step can be forced by court order has the obvious practical effect of destroying whatever possibility might previously have existed for the voluntary submission of the dispute to the arbitral bodies created by the Act. This alone should be conclusive against any congressional intent that paragraph 2 of the Act should be enforceable by court order—it would be absurd to attribute to Congress a minor intent which would completely frustrate its major intent.

The majority of the Supreme Court suggested in Wilson v. New that Congress had power to compel arbitration. The very members who drew, debated and voted the present statute expressed themselves as believing that Congress had this power, but disclaimed any intention of using it in the statute. How, then, can it be said that if Congress deliberately withheld its power to enforce the chief and only purpose of the Act that it intended to put behind this preliminary step the power that it withheld for the enforcement of the ultimate purpose?

The ultimate purpose of the statute, that is, the conferences, settlements and agreements the parties are expected to make, is stated in language just as mandatory as the words found in the third paragraph of Section 2 concerning the selection of representatives. But in the Pennsylvania Railroad case this Court held that under the identical language found in the former statute the court could not compel the parties to *confer* or *agree*; that it could not compel the company to *recognize* or *deal* with the representatives chosen by Federation No. 90.

The jurisdiction of the court is invoked to protect the selection of representatives, a primary step toward the desired end, yet the court is wholly without power to compel this ultimate purpose, it being left entirely to the volition of the parties.

A court will be doing a vain and useless thing if it employs its decrees, writs and processes to compel the selection of representatives that need not be recognized after they are selected, who cannot confer, negotiate or agree except at the pleasure or with the permission of the employer. Courts do not sit to do such idle, empty, perfunctory things—

> "Equity has never yet issued its writ to protect a straw man or a house of straw, therefore equity saves the wheat and fans the straw." Post-Dispatch case, 4 Fed. (2nd) 927.

Similar expressions are to be found in many cases. It was said in Dixie Grain Co. v. Quinn (Ala. 1913), 61 Sou. 886:

> "* * * Equity does not lend its powers for the accomplishment of what is useless. * * *"

In Goodrich v. Moore (1858), 2 Minn. 49, language very apt to the present situation is found:

> "But courts of equity will not exercise their powers for the enforcement of a right or the prevention of a wrong, in the abstract, *and when no actual benefit is to be derived by the party who seeks to exercise such right.* * * *"

Likewise, in Spooner v. McConnell (1838), Fed. Case No. 13245, the court held:

> "It is then an abstract right which he asserts, and which he may never practically exercise. A court of chancery never deals with abstractions, but acts on existing and practical rights, and prevents impending wrongs."

In Gueutal v. Gueutal (1906), 98 N. Y. S. 1002, it was remarked:

> "A court of equity never exercises its powers except to accomplish some purpose. * * *"

This Court has likewise announced the rule in Foster v. Railroad (1892), 146 U. S. 88, 101:

> "In a case of this kind, where the plaintiff seeks to annul a long standing decree, it is a circumstance against him that he does not show a probability at least of a personal advantage to himself by its being done. A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice *or to compel the defendants to buy their peace.* * * *"

Similarly it was said in Voorhies v. Frisbie (1872), 25 Mich. 476, that:

> "The peculiar advantages of equity jurisdiction depend almost entirely on the power of courts of equity to do full justice by a complete control over the matters in controversy, directly, or by personal coercion of the parties. The rule is almost universal that no interference will be exercised unless this complete power exists to compel justice to be done throughout."

A situation analogous to that in the case at bar existed in Joliet & Chicago Railroad v. Healy, 94 Ill. 416. A suit was brought by abutting owners on what is known as "Healy Slough," the object of the bill being to secure the removal of a permanent bridge built by the defendant railroad across the slough, and to require a swing or draw bridge to be erected instead.

The court held that even admitting the plaintiff's right to have the stream free from any obstruction, it did not appear that under existing circumstances plaintiff could use the stream for passage of vessels, because of a strip of land belonging to other parties which would have to be excavated before plaintiffs could make any practical use of the stream.

In denying the injunction for this reason, the court said:

> "Equity will not do that which will be of no

> benefit to the party asking it, and only hardship upon the party coerced, or, as the maxim contained in the old books is, 'the law does not require anyone to do vain and useless things'."

Another analogous case is Owen v. Field, 94 Mass., 457, where a suit was brough to enjoin the defendant from preventing plaintiff from laying an aqueduct across certain of defendant's lands, on which plaintiff claimed an easement for the purpose. It appeared, however, that to bring the water to her own land from the land of the defendant it would be necessary to go along a highway, upon which she showed no right of easement. The court said that it was unnecessary to determine her right across defendant's land, because, even admitting that right, she had not shown herself entitled to the injunction because she had not shown that she could make any beneficial use of the aqueduct even if constructed on defendant's land.

The analogy of both these cases to the case at bar is apparent—the rights sought to be enforced by injunction in the cases above were admittedly legal rights, but because of the impossibility of making an effectual and practical use of the right, the equity courts refused to intervene. In the case at bar, even admitting a legal right in the plaintiffs, a court of equity should not use its powers to enforce it because the plaintiffs have not shown that under existing circumstances the right can be put to any practical or effectual use by them. All that results from enforcing plaintiffs' "right" by injunction is that defendants are gravely injured in rights which are vital to the conduct of their business, while the plaintiffs are, as a practical matter, no nearer to the ultimate object sought than they were before the suit.

It is fundamental that a plaintiff seeking injunction must show a threatened irreparable injury, and must allege the facts in order to enable the court to determine whether the injury will be irreparable. A mere general allegation to that effect will not suffice. Joyce on Injunction, Section 39.

Plaintiffs here show no injury at all for the right which they seek to protect is merely abstract, and can gain them no benefit unless it is followed by further agreements and concessions which the employer is not compelled to make.

IV.

Insofar as the statute undertakes to prevent either party from influencing the other in the selection of representatives, it is unconstitutional and seeks to take away an inherent and inalienable right. The decisions in this case are contrary to the decisions of this Court in Adair vs. United States, 201 U. S. 161, and Coppage vs. Kansas, 236 U. S. 1, and violative of the First Amendment to the Constitution.

The evidence in this case, while it shows that the railroad company and its officers perferred to deal with an organization with membership limited to its own employes, also shows that attempts to influence employes to join the Association were made by only three officers and agents: (*a*) by the Assistant Agent at Houston, who spoke to 92 employes—Unsuccessfully as to 84, successfully to 8; (*b*) by the Agent at Dallas, who spoke to two or three employes, unsuccessfully in each case, and (*c*) by an Assistant Superintendent on the Houston Division, who spoke to one employe unsuccessfully. (Pages 29 to 35, supra.)

The decisions of the courts below are based on the assumption that Congress not only has made it unlawful for employer or employe to influence or attempt to influence the other with respect to the employment, but that Congress has power to do so. While denying that Congress intended such provision of the Act of 1926 to be compulsory, it is submitted that Congress has no such power.

The defendants Waid, Torian and Lull were held guilty of contempt of court for alleged violations of the temporary injunction granted in this cause, and were ordered to (1) cease to permit officers of the Association to promote its affairs on railroad time unless the Bro hood be granted the same privilege, (2) disestablish the Association and reinstate the Brotherhood as representative of the clerical employes in all matters affecting their employment with the company. (3) reinstate with pass and other privileges, two nominal and three actual employes who had been discharged, reimbursing the latter for time lost, (4) to pay to Fulbright, Crooker & Freeman $2,000.00 attorney's fees for services in the contempt proceedings. Failure to perform the acts meant indefinite confinement in jail for the individual defendants. (Tr. 266-269.)

The discharge of the employes, the recognition of the Association as representative of the clerical employes, the refusal to thus recognize the Brotherhood, and allowing the officers of the Association to foster its interests on railroad time were thus held to have been forbidden to these individual defendants by the temporary injunction.

It is submitted that the injunction order, as thus interpreted by the court, was absolutely void and sought to deprieve the defendants, Waid, Torian and Lull, of their liberty guaranteed by the Fifth Amendment. If power to enter such an order is contained in the Railway Labor Act, then such provision is likewise void.

Insofar as the injunctive order sought to enjoin the defendant, Texas & New Orleans Railroad, and its officers from influencing its employes in their selection of representatives it is likewise void, and the Railway Labor Act is void also in so far as it confers such powers upon the courts, being a deprivation of property without due process of law, contrary to the Fifth Amendment.

In 1898 Congress attempted to make it an offense, among other things, to discharge, threaten to discharge or discriminate against an employe because of membership in a labor organization. One Adair was indicted and convicted for discharging an employe for membership in a labor organization. On appeal this Court held the Act void. *Adair v. United States*, 208 U. S. 161. The court said that:

> "It is sufficient in this case to say that as agent of the railroad company and as such responsible for the conduct of the business of one of its departments, it was the defendant Adair's right—and that right inhered in his personal liberty, and was also a right of property—to serve his employer as best he could, so long as he did nothing that was reasonably forbidden by law as injurious to the public interests. *It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted*, and it was the right of Coppage to become or not, as he chose, an employe of the railroad company upon the terms offered to him."

It is plain from the language quoted that under this holding, Lull, Waid, and Torian each had an inherent constitutional right even *to make membership in the Association a condition to the continuation of employment.* Certainly this includes the lesser right to peaceably, without threats, influence employes to join the Association, and to recognize the Association as the only organization through which they would confer and negotiate with their employes. It is plain from the language above cited that the defendants had the constitutional right to refuse to confer or negotiate with any organization at all, which includes the right to confer and negotiate only in a particular manner. The effect of the injunction as interpreted by the court is to give to one organization a monopoly of representation before the employer, an effect never intended by Congress, and beyond its constitutional power.

A State statute similar to that involved in the Adair case was held unconstitutional in Coppage v. Kansas, 236 U. S. 1, and other statutes attempting in a similar way to abridge the employer's freedom of contract have been uniformly held unconstitutional by the State Courts. Gillespie v. People (Illinois 1900), 58 N. E. 1007; State v. Julow (Missouri 1895), 31 S. W. 781; State v. Goodwill (W. Va. 1899), 10 S. E. 285; Coffeyville Vitrified Brick Co. v. Perry (Kansas 1904), 76 Pacific 848; People v. Marcus (New York 1906), 77 N. E. 1073; State v. Daniels (Minnesota 1912), 136 N. W. 584; People v. Western Union Telegraph Co. (Colorado 1921), 198 Pacific 146; State v. Kreutzberg (Wisconsin 1902), 90 N. W. 1098; Railway v. Schaffer (Ohio 1902), 62 N. E. 1036; Montgomery v. Pacific Electric R'y Co. (C. C. A. 9th Circuit 1923), 293 Fed. 680; Owen v. Westwood Lbr. Co. (Oregon 1927), 22 Fed. 2nd 992.

In the Coppage case the court's words are particularly applicable to the case at bar:

> "But, irrespective of whether it has received judicial recognition, is there any real distinction? The constitutional right of the employer to discharge an employe because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employe an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? *Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relaiionship?* And may he not insist upon an express agreement, instead of leaving the terms of the employment to be implied. Can the legislature in effect require either party at the beginning to act covertly,

concealing essential terms of the employment—terms to which, perhaps, the other would not willingly consent—and revealing them only when it is proposed to insist upon them as a ground for terminating the relationship? Supposing an employer is unwilling to have in his employ one holding membership in a labor union, and has reason to suppose that the man may prefer membership in the union to the given employment without it—we ask, can the legislature oblige the employer in such case to refrain from dealing frankly at the outset? And is not the employer entitled to insist upon equal frankness in return? Approaching the matter from a somewhat different standpoint, is the employe's right to be free to join a labor union any more sacred, or more securely founded upon the Constitution, than his right to work for whom he will, or to be idle if he will? *And does not the ordinary contract of employment include an insistence by the employer that the employe shall agree, as a condition of the employment, that he will not be idle and will not work for whom he pleases, but will serve his present employer, and him only, so long as the relation between them shall continue*? Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

"These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has

> the right to provide against by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case cannot be distinguished from Adair v. United States."

The same question was recently passed on by this Court when it denied a writ of certiorari (264 U. S. 586) in the case of Montgomery v. Railway, 293 Fed. 680. Lately, also, a Federal Court held unconstitutional a statute making it unlawful for employers to prescribe the stores at which employes might buy their supplies. Owen v. Westwood Lbr. Company, 22 Fed. (2d) 992.

The injunctive order likewise infringed the right of the company not to have its property taken without due process of law, since it is clerarly established that freedom of contract is a property right within the constitutional inhibition.

Smith v. Texas, 233 U. S. 630, 636.
Adair v. United States, 208 U. S. 161, 172.

In the *Coppage* case it was suggested that *coercion* of employers toward employes and *vice versa* might constitutionally be forbidden, but held that discharging an employe for membership in a labor union was not "coercion" in the legal sense, it being said that—

> "*Nor can a State, by designating as "coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard.*"

The same view of legal coercion has been taken by Justice Brandeis. Dissenting in *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 271, he said:

> "It is also urged that defendants are seeking to 'coerce' plaintiff to 'unionize' its mine. But

> coercion, in a legal sense, is not exerted when a union merely endeavors to induce employes to join a union with the intention thereafter to order a strike unless the employer consents to unionize his shop. Such pressure is not coercion in a legal sense. The employer is free either to accept the agreement or the disadvantage. Indeed, the plaintiff's whole case is rested upon agreements secured under similar pressure of economic necessity or disadvantage. If it is coercion to threaten to strike unless plaintiff consents to a closed union shop, it is coercion also to threaten not to give one employment unless the applicant will consent to a closed non-union shop. The employer may sign the union agreement for fear that labor may not be otherwise obtainable; the workman may sign the individual agreement for fear that employment may not be otherwise obtainable. But such fear does not imply coercion in a legal sense."

And this Court held in the *Coppage* case that the act of discharging an employe for refusal to sever his connections with a labor union was "*entirely devoid of any element of coercion, compulsion, duress, or undue influence.*" (263 U. S. 15.)

It is submitted that the courts below have done what the Supreme Court of Kansas did in the *Coppage* case—held to be influence (and the statute can only be taken to mean *undue* influence) that which is not such in the legal sense or any fair sense of the word. In so doing the courts below have given a meaning to the statute which renders it unconstitutional, and which places upon this court the duty of declaring the orders of the courts below null and void.

So clearly established by the *Adair* and *Coppage* cases is the constitutional right of the employer to influence the employe with reference to his relations with organizations which the employer may deem harmful to his business that the court below has tacitly admitted the applicability of these cases to the case at bar, but has argued that they are no longer the law, that times have changed, and that the law has changed with the times. (Tr. pp. 242.) It has also been suggested that *Wilson v. New*, 243 U. S. 332, overruled the *Adair* case.

If it be admitted that the limitations of the Fifth Amendment expand and contract to meet changing conditions, that principle can have no application here, for new and different conditions as required (Euclid v. Ambler Realty Co., 272 U. S. 365) do not here exist.

The Act of Congress held unconstitutional in the *Adair* case was the aftermath of the most disastrous railroad strike in our history, and admittedly designed to prevent similar strikes in the future, yet this Court said:

> "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, *it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another*, or to compel any person, against his will, to perform personal services for another." (208 U. S. 174.)

The suggestion that the Commerce Clause could excuse legislative regulation of employers in their relations with labor organizations was refuted in no uncertain terms, the court saying:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be with-

in the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated. But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, in itself and in the eye of the law, any bearing upon the commerce with which the employe is connected by his labor and services. Labor associations, we assume, are organized for the general purpose of improving or bettering the conditions and conserving the interests of its members as wage-earners—an object entirely legitimate and to be commended rather than condemned. But surely those associations as labor organizations have nothing to do with interstate commerce as such. One who engages in the service of an interstate carrier will, it must be assumed, faithfully perform his duty, whether he be a member or not a member of a labor organization. His fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employe as a man and not as a member of a labor organization who labors in the service of an interstate carrier. Will it be said that the provision in question had its origin in the apprehension, on the part of Congress, that if it did not show more consideration

> for members of labor organizations than for wage-earners who were not members of such organizations, or if it did not insert in the statute some such provision as the one here in question, members of labor organizations would, by illegal or violent measures, interrupt or impair the freedom of commerce among the States? We will not indulge in any such conjectures, nor make them, in whole or in part, the basis of our decision. We could not do so consistently with the respect due to a coordinate department of Government. We could not do so without imputing to Congress the purpose to accord to one class of wage-earners privileges withheld from another class of wage earners engaged, it may be, in the same kind of labor and serving the same employer. Nor will we assume, in our consideration of this case, that members of labor organizations will, in any considerable numbers, resort to illegal methods for accomplishing any particular object they have in view." (208 U. S. 178-9.)

What change of conditions has come about to bring "within the functions of Government" the compelling of an employer to retain in his service an unwanted employe, or compelling him to deal or not to deal with certain groups of his employes? What new and different conditions now make railway labor organizations so definitely connected with interstate commerce that Congress may require the employer to deal or not to deal with them in certain ways? We have no evidence of any. If the evils existing in 1898 after the great strike were not sufficient to authorize a much milder interference with the relations of employer and employe, it is difficult to see how conditions have so changed as to authorize an even greater interference when conditions have changed, if at all, for the better. This Court seems still to regard the *Adair* case as law.

Adkins v. Childrens Hospital, 261 U. S. 525, 545.

Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 251.

Montgomery v. Railway, 293 F. 680, Cert. den. 264 U. S. 586.

The doctrine of *Wilson v. New*, 243 U. S. 332, since it deals only with the power of Congress with respect to interstate commerce in face of a national emergency, can have no bearing on the case at bar or the authority of the *Adair* case. Said this Court in the *Adkins* case, *supra*:

> "The act was not only temporary in this respect, but it was passed to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. * * * 'The regulation is put and justified only as a temporary measure (citing Wilson v. New, *supra*). A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change'." (261 U. S. 551.)

To the same effect see Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416; Wolff v. Industrial Court, 262 U. S. 522, 542, 544; Tyson v. Benton, 273 U. S. 418, 437.

Indeed, this Court has held that when the emergency has passed, the law must fall as conflicting with the Constitution. Chastleton Corp. v. Sinclair, 264 U. S. 543.

The Act as interpreted by the courts below is also a denial of due process in its discriminatory features and its denial to the corporation and its officers of the equal protection of the laws. Only railroads and their officers and agents are by the Act denied the right to influence employes with reference to their labor affiliations.

This cannot be said to be a just and proper classification, for the right to control and influence employes is arbitrarily taken from the very class in which such control and influence is most necessary and vital because of the extreme liability and the public trust imposed upon them.

To hold that Congress may constitutionally take from an employer, railway or not, his right to be free in the selection of his employes, his right to influence them in their organization affiliations, and his right to decide what may interfere with his employes' loyalty, would be a radical and unwarranted departure from those Constitutional principles which have so long governed us.

The inconsistency and injustice of such a holding has nowhere been better put than by the Supreme Court of Ohio in Railway v. Schaffer, 62 N. E. 1036:

> *"For example, it would be very inconsistent and unjust if, while holding railroad companies to strict accountability for the negligence of their servants, we should restrict them in the natural right to protect themselves in the matter of the selection of their employes."*

Under Section 15a of the Interstate Commerce Act, as amended February 28, 1920 (41 Stat. L. 488; U. S. Code, Title 49, sec. 15a) the Commission is required to initiate, modify or adjust railroad rates so that the railroads of the country, as a whole, or as a whole in rate groups to be designated by the Commission, will *under honest, efficient and economical management*, and reasonable expenditures for maintenance earn a far return on the aggregate value of their property held for and used in the service of transportation. It follows of necessity that there is thereby imposed on the railroads the express duty of providing honest, efficient and economical management.

The Second Section of the Act of 1926, if compulsory, is not a regulation of the use of the company's property in Interstate Commerce, but an usurpation of the right of the owners to manage their properties and control the conduct and character of their employes. It is not a regulation of Interstate Commerce but an attempt to control and manage the labor affairs of the company.

Reversing the situation renders the unconstitutionality of the Act as interpreted by the court equally apparent—Suppose an employe should express a preference for dealing with Waid rather than Torian and threatened to quit unless his demand was granted. Could a court constitutionally compel him to remain in the employ of the company? The question carries its own negative answer.

Indeed, to hold this part of the Act mandatory and valid we would be going even farther than the "border line" reached in face of a national emergency in the New case. Said Chief Justice Taft in Wolf v. Court of Industrial Relations, 262 U. S. 522, 545:

> "It is not too much to say that the ruling in Wilson vs New went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster."

A mere temporary fixing of a wage scale is a minor compulsion compared to the permanent destruction of the company's right to control and influence its employes in matters concerning their loyalty and character, a right far more necessary to railroads than to other lines of endeavor, because of public trust and strict liability imposed upon them. If the Fifth Amendment does not forbid the exercise of such power by Congress, then the Supreme Court has long been in error, and railroads need look no longer to the Constitution for protection.

V.

Section 52, Title 29, of the United States Code, which was Section 20 of the Clayton Act, prohibits the granting of an injunction in this case.

The essential portions of the section cited are:

> "No restraining order or injunction shall be granted by any court of the United States or a judge thereof in any case between an employer and employe * * * growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, and such property or property right must be described with particularity in the application. And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment * * * from recommending, advising or persuading by peaceful means to do so * * * or from peacefully persuading any person to work or abstain from working; * * * or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

This Court has construed the act as being only declaratory of the law as it stood before. Duplex Printing Press Company v. Deering, 254 U. S. 443; American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184.

To meet the requirements of this statute, counsel who drew plaintiff's bill made the following allegations of "property" rights threatened with "irreparable" injury:

(1) That complainants will be deprived of important property rights by way of loss of increased wages, and by way of being denied the right to contract for their labor and services with the defendant, Texas & New Orleans Railroad, through collective bargaining and representatives of their own choice * * *.

(2) They will be deprived of work and conditions of work under arrangements as to representatives which will insure fair wages and working conditions. * * *

(3) They will be forced to withdraw from membership in the Brotherhood, and it will be dissolved, and Harper and other members will lose their interest in certain valuable real estate and other property owned by the Brotherhood, and will lose the insurance protection afforded them by the death benefit fund of the Brotherhood *'* * (R. 38-39.)

The "dispute" here involved is clearly within the class included in the statute. The word "dispute" in the act refers to "terms and conditions of employment, such things as hours of labor, wages, classification of employes, sanitary and physical conditions controlled over by employer, opportunity for reasonable redress of grievances and for bargaining respecting the conditions of employment, whether collective or individually." (Vonnegut Machinery Co. v. Toledo Mach. & Tool Co., 263 Federal 191, 201.)

The first two allegations above referred to attempt to classify as "property rights" vague speculations as to "increased wages," "better working conditions," etc., *which might in the future* be granted, but which have no present existence, nor even any probable future existence. Whether or not "better wages" and "better working conditions" will in the future be granted to these plaintiffs, or any of them, rests entirely within the control of the defendant. As well argue that "A" has a property right in "B's" money because "A" may, in the future, be able to get it away from "B" by threats, coercion, or other means.

The allegation as to the loss of the right to contract through collective bargaining is equally absurd. All that is shown by the evidence is that the Brotherhood, *bargaining collectively*, was unsuccessful in negotiating a new contract for the clerical employes, while the Association, *bargaining collectively*, was successful. The Brotherhood can still bargain all it pleases, but no one would assert that the Company is bound to contract. What plaintiffs allege is the absurd proposition that they have a "property right" in *being unsuccessful*!

The allegations in the third paragraph above that the complainants would lose their interest in valuable real estate and insurance benefits are not supported by any proof. No evidence was offered to show that the Brotherhood owned real estate, or how complainant's title or interest in it would be lost. Nor was there any evidence offered as to the insurance benefits of the Brotherhood. The witness Harper testified that group insurance was carried by the Company for its employes, but the insurance referred to in the bill is "insurance protection afforded by the death benefit fund of the Brotherhood." There is no proof of such insurance, or that the Brotherhood had such a fund. Neither is there proof that anything done or contemplated by the Company will force any member of the Brotherhood to withdraw.

The Circuit Court of Appeals, for the First Circuit recently held that even a strike in *violation of a written contract* did not irreparably injure a property right within the meaning of the act here being discussed. Any resulting injury, said the court, would be *damnum absque injuria*. Foss v. Portland Terminal Company, 287 Federal 33. How then, can a property right be said to exist in the possibility of wage increases in the future, and the right to *make a contract* through representatives, when the so-called "right" depends entirely upon the willingness of the other party to agree to it? No evidence was offered that the Company would make any future agreements whatever.

In *Bonifaci v. Thompson*, 252 Fed. 878, the District Court for the Western District of Washington, in a suit by an alien to enjoin his induction into the military service under the Selective Service Act, claiming that the interruption of employment thus brought about would deprive him of a property right, held that the complainant had in no just sense a right of property in his employment.

The District Court has answered the contentions under this proposition by the broad assertion that:

> "It is just as much a property right of an employe to work in interstate commerce under a guarantee granted to him by Congress, that his wages and working conditions shall not be fixed for him without representation as it is for an employer to have the right to continue operations in interstate commerce protected from activities of persons who would seek to prevent that operation, by inducing persons not to work for them." (R. 401.)

The Court in so holding ignored the fact that petitioners had the unquestioned right to fix wages and working conditions of employes without any representation on their part, and that the so-called contracts—in fact wage schedules and rules, under which railroad employes customarily work—are in no true sense contracts for the reason that either employer or employe has the right to terminate the employment at will (*East Line & Red River Railroad Co. v. Scott*, 72 Texas, 70, 75; *St.*

L. S. W. Ry. Co. v. Griffin, 106 Texas, 477, 483; *T.M. R. R. v. Morris*, 69 S. W. Reporter, 102.)

The Circuit Court of Appeals (R. 1142-1143), after suggesting that perhaps the provision of the Clayton Act applied to suits by employers but not by employes, a supposition clearly inadmissible on constitutional grounds, holds that the right to negotiate through a designated representative, with the hope but with no assurance of success, is a property right. In referring to the letter from the Executive Vice President to the of the defendant, in which it was stated that the demands of the Brotherhood would amount to an increase in clerical pay roll of approximately $340,000. per year (R. 772-4), the Court overlooked the fact that there was and is no intention of granting the demand of the Brotherhood. for a general increase of 10 cents per hour, and that though it was supposed that through the Association the employes could be satisfied by an increase of $75,000 per year, the Association actually obtained $100,000.

It is plain from the foregoing that the courts below simply enlarged the provisions of the Act of 1926 to the point where a plausible statement of a property right could be made. An analysis of the provisions of that act plainly shows that no such right as suggested by the court is conferred, even if the act be held to be mandatory.

The most that is conferred by paragraph three of Section Two is the right to be free from interference, etc., in selecting representatives. This is a purely *personal* and not a property right—a *personal* right to be free from annoyance and interference. It has not been contended that the Company must obey or even hear the representatives, however chosen. Nothing in the act even purports to prevent the Company from fixing wages even *without consulting anyone at all*. It is apparent then that the statement of the court that "his wages and working conditions shall not be fixed for him without representation" goes far beyond anything contained in the Act. This is the only property right found by the court, and since without it no injunction could have been granted consistent with the statute here discussed, this phrase must be taken to be the basis of the power to grant the injunction. This basis clerarly has no foundation in the statute, and the injunction resting upon it must fall.

The injunction, as interpreted by the court, in another respect violates not only the Constitution but the Clayton Act as well. It will be noted from a reference to the portion of that Act quoted herein that "no such restraining order shall prohibit any person or persons whether singly or in concert, from terminating any relation of employment * * * ." Section 53 of Title 29 provides that:

> "the words 'person' or 'persons' wherever used in Section 52 of this Title shall be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." (C. 323, Sec. 1, 38 Stat. 730.)

Thus there can be no doubt of the Congressional intent that the Act protects employer as well as employe. The court below has interpreted the temporary injunction to mean that the company may not exercise this right to terminate the relation of employment, and has forced the individual defendants by threat of jail sentence, to reinstate employes discharged for violation of the company rules. While it needed no Clayton Act to create the right of the employer or employee to quit the relation of employment, the fact that such right was expressly preserved by Congress, and was called to the attention of the court below without avail, but illustrates the fact that the injunction granted below, as interpreted by the court, is the very type af court action which the Clayton Act was designed to prevent.

VI.

The recognition of the Association was legally justified and was not a violation of the temporary injunction which the court had granted though it be conceded for sake of argument that the injunction was lawfully issued.

In order to fully understand the proper scope that should be given the temporary injunction and to understand the scope and meaning which the defendants gave it, it is necessary to recite rather fully antecedant facts with reference to the history of the Brotherhood and the Association and to understand just exactly the situation that confronted the defendants at the time the injunction was issued and at the time they recognized the Association on the 6th of August.

These facts, to the time of the granting of the temporary injunction, and to the time of the recognition of and contract with the Association are fully shown in this brief, pages 19 to 47.

Petitioners did not have the remotest idea that the *recognition of the Association* was a violation of the injunction, and the subsequent orders of the court adjudging them guilty of contempt were a genuine surprise to them and their counsel.

The temporary injunction restrains the defendants "from in any way or manner interfering with, influencing, intimidating or coercing plaintiffs or any of the approximately 1700 clerical employes * * * with respect to their free and untrammeled right of selecting or designating representatives, etc." (Record p. 83.)

What the defendants did and all they did after the injunction was entered was to recognize the Association as representative of the employes on the 6th of August, and to enter into a wage agreement with the Association on the 20th of August. The Association had been organized prior to the time the bill for injunction was filed. Its permament organization was perfected on July 11, 1927, at which time officials and representatives were chosen and the Constitution and By-Laws adopted. (R. 982-986.)

In the affidavit which Torian presented to the court at the hearing of the application for temporary injunction the court was fully advised that it was the purpose of the company and its officials to deal with the Association rather than the Brotherhood provided a majority of the employes requested the company to do so. In this affidavit Mr. Torian said:

> "When the said pending matter shall have been disposed of or dismissed by the Board of Mediation *it is the purpose of affiant to consider the said request and the said alleged authorizations of the Association and thereupon to treat with and consider as representative of the clerical employes of the Texas & New Orleans Railroad Company said organization, provided it shall have authority to act for and represent the majority of its clerical employes* * * *." (R. 415.)

Here Torian speaking for the defendant company told the court just what the company proposed to do, and the court did not enjoin it.

These facts present the highest evidence of good faith of Torian and the other defendant officials of the railway company. They appeared in court through their counsel and did not challenge the statute, though they felt then, as they feel now, that it is inoperative. They were so sure of the correctness of their position that they accepted the court's injunction without a present motion to modify or dissolve. They did on the 6th, four days after the order for injunction was formally entered, what they told the court they would do, namely, check the letters of authorization of the Association which had already been prepared when the injunction was granted and recognize the Association. The court did not enjoin them from doing any of these things and certainly none of them amount to contempt of court.

With respect to the right of the Association to act for the clerks, and the right of the Company to recognize the Association, the District Court said:

> "In the view which I have taken that the authorizations on which the company acted were procured in violation of the law, it would serve no purpose to extend this opinion further by a discussion of the hypothesis whether, if lawfully obtained, they were sufficient in number.
>
> "Entertaining that hypothesis, however, for a moment, I think it plain, that there were not sufficient authorizations of those qualified to vote, to constitute a majority. But I think it further plain that irrespective of the number and of the legality of their obtaining, it was never contemplated that representation of a class could be founded upon conglomerating into a ballot for an Association of Clerical Employes these heterogeneous requests for higher pay." (R. 261).

But were these authorizations procured in violation of the law? The Association had been created by a very considerable number of clerks on their own initiative—of their own free will and accord. They devoted their own time and their own funds to the work. In addition, some of them had sought and obtained recruits on the Company's time, as their regular duties permitted it, and when away from home on Company business had devoted their spare time to the same work, making no deduction from the small amounts paid by them as expenses and refunded by the Company. Superintendents of divisions, knowing this, did not seek to prevent it and, on the contrary, may be assumed to have encouraged it. In these efforts they were combating like activities on the part of the Brotherhood, through its officers, Harper and Walker, who used free passes furnished them by the Railroad Company. It cannot be doubted that such of the clerks as were enthusiasts in favor of the Brotherhood also sought recruits for it on Company time as occasion offered and if any of them were absent from their regular places of employment on Company business and entitled to refund of their expenses on this account, it cannot be doubted that they charged the whole of their expense, making no deduction, pro rata or otherwise, on account of such time as they might have devoted to the interests of their organization. It cannot be doubted that the officers of the Company and the clerks who favored the Association knew this, or at least had the strongest possible reasons for believing it to be the fact. Were the Company and its officers forbidden by law to aid their employes, so long as there was no unlawful interference, undue influence or coercion? We submit that this question carries its own answer, and that the idea of the Court that the Company and its officers should have tied hand and foot the employes who favored the Association, while furnishing the officers of the Brotherhood with free passes and allowing its members and partisans to do as they would, is contrary to law and to good conscience.

The Association delivered to the Railroad the apparently valid authorizations of 931 clerks out of a total of 1,855 and if the 4 who, unknown to the officers of the Company who received and counted the authorizations, were out of the service and the 16 who, also unknown to the officers of the Company, had undertaken to cancel their authorizations be deducted, the 68 additional authorizations which were in transit at the time should be added,—the Association was, therefore, entitled to speak for 979 out of a total of 1,855. All this fully appears from Appendix "B" of this brief, which is here respectfully referred to. The facts set out in this Appendix also effectually dispose of the suggestions of the Court with respect to clerks "qualified to vote."

The alleged authorizations presented by the Brotherhood were procured in a manner and on a form which were misleading. (R. 437-9; 863-8.) Letter of transmittal of blank so-called authorizations, dated June 14, 1927, states:

"* * * The General Committee has found it necessary to put out a *questionaire* and to urge each and every clerk to immediately fill out and mail one of these forms to H. W. Harper, General Chairman, 211 Moore Bldg., San Antonio, Texas.

"A sufficient supply of these forms are being forwarded to one clerk at all the larger stations, whose duty it will be to make a personal canvass and secure the signature. At the smaller stations and other departments a *questionaire** is being mailed to each individual employe with a self-addressed envelope for its quick return." (R. 866-867.)

The paper itself begins with the statement that the Brotherhood is now handling a controversy which is pending before the Board of Mediation respecting an increase in wages. After this statement it is recited that meetings have been had with Governor Neff, the mediator. Then follow the questions:

> "Do you think we are entitled to an increase of as much as 10c per hour?
>
> "Would you be agreeable to a settlement for a sum less than 10c an hour?
>
> "If so, what amount do you believe would be just and reasonable?"

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*Note: Italics ours.

After these questions the clerk is to sign the following:

> "The above is an expression of my wishes in regard to the matter of an increase in pay which is now being handled by the United States Board of Mediation and I hereby authorize the Brotherhood of Railway Clerks to represent me on the basis outlined above." (Record 437-9.)

It will be seen that this paper styled a questionaire and so likely to be misunderstood at most authorizes the Brotherhood to act in the matter of mediation then pending before the governmental Board.

At the time complainants filed their bill and at the time the injunction was granted and at the time the Association presented its credentials to Torian August 5th, the mediation was at an end. It had failed. Governor Neff had been told by Torian that the Brotherhood did not in Torian's opinion represent anything like the majority of the employes. He had gone to Harper and requested specific information about this, which was promised him, but never furnished, and thereupon the bill in their case was filed. (R. 851-2.)

The termination of mediation had been brought about on the part of the Railroad Company by its rejection of the proposal of the Mediator that the demands of the Brotherhood be submitted to arbitration (R. 819), the statute providing that such proposal of the Mediator shall constitute his final required action (Railway Labor Act, Section 5, Paragraph (c).) It had been brought about on the part of the Brotherhood by the filing of the bill.

Letters from the Secretary of the Board of Mediation (R. 644-651) meant nothing except that he was still attempting to aid the Brotherhood, notwithstanding the termination of the offices of the Board, and the fact that the Association was acting for the employes.

Under these circumstances, can it be said that Torian did not act in good faith in recognizing the Association as he did and in entering into the wage agreement with ir? That the granting of the request of so respectable a number of the employes was unlawful interference, influence or coercion?

Finally, as to the statement that "it was never contemplated that representation of a class could be founded upon conglomerating into a ballot * * * these heterogeneous requests for higher pay." In this statement the Court wholly ignores the fact that the clerks preferring the Association had elected and selected their representatives; that these representatives had met, reorganized the Association, adopted a constitution, elected officers, and empowered them to act, and that the count of the authorizations was merely a means seselected by the Railroad Company of determining the number of employes represented.

The Circuit Court of Appeals in the majority opinion said:

> "Evidence in support of the allegations of the information included evidence to the effect that after the injunction was issued the Railroad Company, acting through agents authorized by it, brought to bear upon clerks in its employ who were members of the Brotherhood or eligible to membership therein influence and pressure, including promises and threats, to induce such employes to renounce the Brotherhood as the representative of such clerks in dealings with their employer as to rates of pay, rules and working conditions, and to consent to the Association being the representative of such clerks in such dealings." (R. 1139.)

In this statement the Honorable Circuit Court of Appeals is clearly in error. It is an undisputed fact that from the time of the entry of the order for the temporary injunction until the recognition of the Association there was not the least influence or pressure, nor any promises or threats to induce the employes to renounce the Brotherhood, or to adhere to the Association.

In *Typothetae of the City of New York v. Typographical Union No. 6, et al*, 132 Appellate Division, 921; 117 New York Supplement 70, the court held that in contempt proceedings the person proceeded against is entitled to the benefit of any doubt which may exist by reason of the form of the order which it is claimed he has disobeyed so far as a doubt is thus cast upon the fact of the prohibition of an act claimed to have been committed.

So also it is held that, in order to support a judgment holding a persoh guilty of contempt for alleged violation of an order, the order must be so clearly expressed that when applied to the act charged it will appear with reasonable certainty that it has been violated. *In re Huntley*, 85 Fed. 889.

If this court will compare the things that were done and made the basis of the contempt order with what the Supreme Court of the United States recognized as perfectly lawful and permissible in the Adair case, 208 U. S. 161, in the Coppage case, 236 U. S. 1, and the things which Justice Brandeis held permissible in the Mitchell case, 245 U. S. 229, it will at once become apparent that the lower court must have overruled the letter and spirit of these decisions in order to sustain the judgment that was entered. The Court got its consent to ignore these early decisions on the ground that the times have so changed that they have automatically disappeared from the body of our law. In this it was obviously in error.

VII.

The contempt order which the court entered broadens the injunction and in a purely retroactive way condemns and punishes for the things that the injunction did not prohibit. In adjudging the defendants guilty of contempt for the things denounced in the contempt order the court is extending, amplifying and enlarging the injunction, and insofar as it does so the punishment denounced in the contempt order is ex post facto.

The acts complained of in the original bill which are made the basis of the temporary injunction, are fully set out above. (Pages 29 to 35.)

The record shows that McDaniel, Ehlinger and other promoters of the Association were circulating letters and petitions and seeking to induce the clerks to join the Association. Aside from what was said by the Assistant Superintendent, the Agent and the Assistant Agent, above referred to, whatever influence was exerted by the officials of the railway company in favor of the Association and against the Brotherhood was merely the permission that this be done, together with the permissive circulation of information that the company and its officials preferred to deal with the Association. This influence had been exerted. These signatures had been obtained. The Association had been organized when the injunction was granted. The injunction did not in express terms orit is believed by reasonable implication undertake to prevent the recognition of the Association, and its recognition was not a violation of the *letter* of the injunction. Neither was it a violation of the *spirit* of the injunction if the officials acted in good faith believing that the Association was truly representative of its clerical employes.

The Act of 1926, paragraph 3, Section 2, which is the basis of this action, *does not require that representatives be selected by a majority of the employes.* If the officials of the company really believed that the Association more clearly represented the best element of its employes, that it stood for greater fidelity to the company's interest and advancement as well as that of the clerks, and so believing recognized the Association, its action would not be in violation of the injunction or the statute even though there may not have been a clear majority of all the employes in the Association.

On August 5, the Railroad Company received the authorizations tendered by the Association, and after investigation and count of same, finding that they were from a majority of the clerks, and therefore that the Brotherhood must of necessity represent only a minority, on August 6th, recognized the Association, in good faith, as entitled to speak for the clerical employes, thereafter dealing with it as such and declining to deal with or recognize the Brotherhood, and to extend gratuitous favors to its officers.

The District court did not even pretend that any influence, even the mildest, had been exerted on the clerks between the date of the injunction and that of the recognition of the Association, and the agreement with it, but only (in the face of the evidence) that most of the authorizations of the Association had been theretofore obtained "by the use of means in violation of the statute." (R. 256.)

What right did the District court have to enlarge the injunction by requiring petitioners to "completely disestablish the Association of Clerical Employes, etc." or go to jail?

The court, by its order in the proceeding for alleged contempt, deprives a large number of the clerical employes, not parties to the suit, of the very rights which it so solicitously seeks to preserve in the Brotherhood.

If there was any doubt as to the strength of the Association at the time of the hearing of the charges of alleged contempt, there was none at the final hearing. But, says the District court, the authorizations were procured in law by means of interference, influence or coercion! The whole record refutes this statement, yet it is the sole basis of the order that the Association be completely disestablished.

The members of the Association *are* the Association, and but for the domination exercised from afar by the so-called "grand" officers, the members of the Brotherhood would *be* the Brotherhood. The question of the actual membership of the rival organizations is, therefore, under the court's view of the law, of great importance.

At the time of the final hearing the Association had 894 members in good standing, and paying dues for its support, all of whom authorized its officers to represent them in dealing with the Company (R. 1026.) This notwithstanding the denunciation of the Association by the court in its opinion filed February 6th, 1928 (R. 253-262), and the injurious effect of the order entered thereon and here complained of. The Brotherhood had only approximately 463 members, of whom only between 350 and 400 had their dues paid up—that is, were in good standing. (R. 966-7.)

There is no evidence that the membership of the Association was obtained by other means than the voluntary action of the clerks themselves, and the efforts of its officers and members. Authorizations had been sought up to August 5, 1927, when those then in hand were presented to the Company; recognition by the Company was on the following day. (R. 752.) The effort of the Association to secure paying members then began (R. 775-6), and has continued. Some clerks will not pay dues to any organization, and do not belong to either. (R. 759.)

Following recognition on August 6, 1927, the Association secured some 894 members who paid dues at the rate of 50 cents per month, and was self-sustaining. During the negotiations of its officers with the Railroad Company for recognition, for the increase in pay, and the apportionment of the increase among the clerical employes, no deductions were made from the salaries of its officers (as clerks) because of time so lost from the performance of their ordinary duties, and the General Chairman was allowed by his Superintendent to include (as an employe) in his account of personal expenses, refunded by the Company, his expenses for room and meals while absent from his home, and so engaged. (R. 749.)

The two active officers of the Association receive from it fifty dollars each per month, devoting only a part of their time to it. (R. 984-5.) On the other hand the two active local officers of the Brotherhood receive from it or from the organization fund of the national organization their entire sustenance, the General Chairman receiving $3,000.00 per year and his expenses (R. 848), and devote their entire time to its affairs—securing new members, collecting dues, creating and settling grievances, and demanding increases in pay. (R. 846-7.)

Following the recognition of the Association, the making of the agreement with the Association, providing for increases in pay, and the taking effect of said increases, on September 6, 1927, Harper, as representative of the Brotherhood, called on the Executive Vice-President of the Railroad Company, taking with him two clerks in Houston Freight Station, who were also officers and members of the Brotherhood, to demand that the recognition of the Association be withdrawn and that the Brotherhood be recognized and dealt with in its place. These men were each absent for four hours from their ordinary duties and pay for four hours' time was deducted from the wages of each of them. This, coupled with the fact that no deductions were made from the pay of officers of the Association, was alleged to constitute interference, influence or coercion in violation of the injunction, and is the basis of the second paragraph of the contempt order. (R. 116, 138, 181.)

The position of the Company is that it is optional with it whether it shall or shall not make deductions for time lost from the pay of its employes. (R. 181.)

Certainly there is a material difference, of which an employer may well take note, between the situation of employes who discuss in a reasonable manner the need of their fellows and of themselves for an increase in pay and those who make demands deemed to be unreasonable.

There was no evidence that any officers or members of the Association acted "under the aegis of the authority" of the Railroad Company, and none that they even pretended to do so. They did represent, and it was and is true, that the Railroad Company prefers to deal with its own employes in matters relating to their wages and working conditions rather than with the representatives of the so-called National Brotherhood, controlled from afar, and was more likely to grant concessions to the local than to the national organization. (R. 759.)

The order and the decree, in the respect here complained of, extend not merely to the Association but to "any organization of said clerical employes hereafter formed" and require that perpetually any such favors as may be extended to the officers or representatives of such unborn organization shall likewise be extended to the officers and representatives of the Brotherhood.

Prior to the period of Federal control of railroads the Brotherhood was unknown on the Company's lines. What has been may be again. When or if the Brotherhood ceases to hold any of the Company's employes as members, notwithstanding some other organization may represent them, and to their entire satisfaction and to that of the Company, its officers and representatives, is this preposterous order still to stand?

What has been said applies, it is believed, to the third as well as to the preceding paragraphs of the contempt order:

> "Reinstate and reestablish the said Brotherhood as the representative of the clerical employes * * * until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, or by any other means of selection which the employes themselves may decided upon and adopt, and without the dictation or interference of said Texas & New Orleans Railroad Company, H. M. Lull, G. S. Waid, or J. G. Torian, shall chose another representative or representatives." (R. 392.)

The matter of selection or recognition of representatives in not one which ought or, indeed can be regulated by injunction, but even assuming, as the lower court did that it had the necessary power, it is clear that it should, not have been exercised to disenfranchise and discredit so many employes merely because there was no antipathy between them and their employer.

The bill in this case is drawn under Equity Rule 38, the Plaintiffs purporting to represent *all* the clerical employes of the Company eligible to membership in the Brotherhood and Association. The court below has treated the case as though plaintiffs actually do represent *all* such clerical employes. But Equity Rule 38 authorizes the suit to be brought in behalf only of a group or class having a common interest, and since it is plain from the record that *two* classes of such clerical employes exist on defendant's road with interests diametrically opposed, these plaintiffs, under Equity Rule 38, can be taken to represent only the class of clerical employes favorable to the Brotherhood. Indeed, certain officials of the Association, themselves clerical employes, were originally parties defendant, but were dismissed. (R. 78). The whole record makes plain that the plaintiffs do not represent *all* the clerical employes, as alleged in the bill and accepted by the court, and it is further plain that the suit is *not* simply a trial of right between Company and employes, but in truth and in fact a trial between rival groups of employes, one group not being before the court and powerless to protect its rights herein. The rights of a large class of defendant's employes have been adjudicated and destroyed by the orders and decrees below without that class being represented before the court. It may be true that the Company is interested in the success of the Association representing a large group of its employes, but the Association, and the employes represented by it, are entitled to more than vicarious representation when rights vital to them are in question. To say that the Association and its rights are artificial, owing existence only to the power and influence of the Company, and that there is therefore no real conflict between the employes themselves, is to disregard the evidence and to say that no employe could possibly prefer effective representation by a local organization to representation and domination by a foreign group.

It cannot be too greatly emphasized that this case is no mere dispute between employer and employe, but is of crucial moment to great numbers of employers and employes alike throughout the whole United States. The real struggle is between those workers who believe in national organization controlled and ruled by centralized bodies, and those who believe in local, home controlled organizations, unobligated by foreign ties. The difference is between those workers who desire to fight the battles of every other worker in the country, no matter how far removed he may be geographically, or in interest. It is notorious that the national organizations have steadily lost prestige among the workers themselves during the past few years, and that foreign domination has had much to do with it. Many workers are now sincerely convinced that their own selfish interests are best subserved by membership in local organizations, working out local problems through co-operation with the employer. Are these men to be denied their constitutional rights merely because the employer happens to approve and encourage their efforts, because the employer sees in the movement a benefit for himself as well? The question has been answered in the affirmative by the decision of the court below, and though these defendants may have no standing to protect the constitutional rights of parties not before the court, the practical effect of the court orders below should have large weight in determining the disposition of the case here. The orders below have given to a national union a monopoly of representation on the defendant's road, and have destroyed a valuable contract owned by the rival association. Such a result can only be defended on the theory that no man really wants to belong to the Association—a proposition demonstrably false.

The evil results, both to employer and employe, as well as third parties, of foreign domination of labor organizations are typified in such cases as Loewe v. Lawlor, 208 U. S. 274, Duplex Printing Press Company v. Deering, 254 U. S. 443, and Bedford v. Stonecutters Association, 274 U. S. 37. This evil is recognized by many workers as well as employers, and it is not the function of legislatures or courts to tell employe and sympathetic employer that they may not together make a legitimate effort to destroy the evil and work out their own particular salvation. The orders of the court below have given to the Brotherhood a monopoly of representation for more than two years, and it has accomplished nothing, and at the same time those orders have destroyed a peaceable and satisfactory agreement already consummated, and have forbidden the employer to peacefully agree with his employes in the future. The result of these orders has been not to create agreement, but to forbid it; not to avert strife, but to create it. Was this what Congress intended?

VIII.

Retention of officers of the Brotherhood on seniority rosters while devoting their entire time to their organization, and granting them free passes and other gratuitous benefits were mere favors, revocable at the pleasure of the employer. Their revocation was in the exercise of constitutional rights of the employer and its officers, and the order of the District Court requiring their continuance deprived petitioners of their property without due process of law, and of the equal protection of the laws. The Court had no power to restore a status resting on no legal right.

The facts with respect to Harper, General Chairman, and Walker, General Secretary-Treasurer of the Brotherhood, are as follows:

Harper had been employed by Southern Pacific Company, Pacific System, at Tucson, Arizona, as a brakeman, and had been discharged for drinking intoxicants. (R. 1085-6.) On the false representation, verified by his affidavit, that the reason for leaving his last employment was that he had resigned, he was employed as a clerk by the Railroad Company (photostat of personal record of Harper between pages 1086 and 1087 of Record). He was appointed or elected about June 9, 1923, General Chairman of the Brotherhood and was granted an indefinite leave of absence effective June 15, 1923. From this date forward he rendered no service to the Railroad Company and received no pay from it, but was paid by the Brotherhood, to whose interests he devoted his entire time. (R. 812, 848.)

Walker had been employed by The San Antonio & Arkansas Pass Railway Company, had been appointed or elected an officer of the Brotherhood, and was on leave of absence from the service of his nominal employer when, on May 1, 1925, its properties were leased to the defendant, Texas and New Orleans Railroad Company. (R. 801-2.) On August 30th, 1925, he requested of said last named Company an indefinite leave of absence which was granted. (R. 502.) He rendered no service to the Railroad Company, and received no pay from it, but was paid by the Brotherhood, to whose interests he devoted his entire time—except that he was recalled from leave and rendered service to the Company from February 7, to March 4, 1927. (R. 885.)

During their leaves of absence the names of both Harper and Walker were carried on the seniority rosters of the Company, it being thereby indicated that in the event of their return to the service, their seniority would be deemed to date from the time of their original employment. (R. 814-5.)

They were allowed the benefit of the Company's group insurance, the Company paying the premiums on the first five hundred dollars, and the employe, at a very low rate, on the remainder. (R. 813, 876.)

They were permitted by the Hospital Association of the Southern Pacific Lines, which is controlled jointly by the employes and the Company, to share in its benefits, at the rate of one dollar per month, like employes regularly in the service. (R. 813, 877-9.)

Free annual passes were furnished Harper, good over all lines of the Company; similar passes were furnished Walker over the lines of the Houston Division and free passes elsewhere. Dependent members of the families of both were, on reasonable request, usually furnished free passes. (R. 814, 890-902.)

Following the recognition of the Association, and consequent non-recognition of the Brotherhood, these men were dropped from the rosters and their privileges as nominal employes terminated. (R. 139-140, 803-804.)

These men were at most only nominal employes, at the pleasure of the employer. Harper, having entered the service, and having remained nominally in it, through deception could not complain of the termination of the relationship under any circumstances. (*Minneapolis, etc. R. Co. v. Rock*, 279 U. S. 410, 412.)

But assuming that their status was no different from that of any working clerk, the injunction, as interpreted by the court violates not only the Constitution but the Clayton Act as well. It will be noted from a reference to the portion of that Act quoted herein that "no such restraining order shall prohibit any person or persons whether singly or in concert, from terminating any relation of employment * * * ." Section 53 of Title 29 provides that:

> "the words 'person' or 'persons' wherever used in Section 52 of this Title shall be deemed to include corporations and associations existing under or authorized by the laws of the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country." (C. 323, Sec. 1, 38 Stat. L. 730.)

This Court in *Adair* v. *United States*, 208 U. S. 161, has said:

> "While, as already suggested, the rights of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another." (P. 174.)

It said in the *Coppage* case that the act of discharging an employee for refusal to sever his connections with a labor union was "*entirely devoid of any element of coercion, compulsion, duress, or undue infulence.*" (263 U. S. 15.)

As the status of these men rested on no legal right, there could be no legal wrong in its termination, and the District Court was without power to restore it.

IX.

Discharge of employes, for causes wholly disconnected with the labor dispute, and necessary, in the opinion of supervising officers of the Railroad, to the maintenance of discipline was not and could not be a violation of the injunction against interference, influence and coercion in their right of organization and selection of representatives. The Railroad has the right to discharge employes for any cause, or (though it does not exercise it) for no cause. The order of the District Court, requiring the restoration of the discharged men to the service with pay for time lost deprived petitioners of their property without due process of law and deprived them of the equal protection of the laws.

Among other employes discharged by the Railroad Company were three clerks, members or claiming to be, of the Brotherhood: One of them, Charles Ginsberg, about October 4, 1927 for absenting himself from duty contrary to instructions (R. 498-9, 551-7); another, B. G. Hudson, about October 27, 1927, for fraud in obtaining free passes by means of a false statement (R. 159-160, 560-576, 1036); and the third, R. E. Stotzer, about October 30, 1927, for negligence in waybilling two car loads of perishable freight to the wrong destinations (R. 491-4, 564-8, 637.) Each admitted the commission of the offense, but it was claimed that the *motive* of the punishment or its severity, was their connection with the Brotherhood.

Hudson and Stotzer had made affidavits which were used by the Brotherhood on the hearing of the application for the temporary injunction, but Ginsberg first appeared in the case, and in the Brotherhood after his discharge.

Each of these men was an employe at will, each was guilty of an offense for which he might have been discharged under any imaginable contract of employment, and each was discharged for that offense.

The Railroad Company had no legal right to require any of them to remain in its service for even a moment after he determined to leave it for any reason or for no reason. So also none of them had the legal right to remain in the service of the Company after it had determined to discharge and had discharged them—for any reason or for no reason. The usual practice of the Company not to discharge men except for cause, which might on the one hand, be reduction of force or some like cause due to no fault of the employe, or, on the other, some violation of law or breach of duty or of rules—some fault of the employe, does not and cannot alter the rights of the parties. But assuming that it could and did, Ginsberg had violated the rules of his employer, Stotzer had failed in his duty and Hudson had decieved his employer and attempted to cause the violation a penal statute of the United States. (Interstate Commerce Act Sec. 1, paragraph 7; U. S. Code, Title 49, Sec. 1, par. 7.)

It is believed that the authorities referred to under the preceding point sufficiently cover this.

X.

The injunctions, temporary and perpetual, are framed in such general language, and so interpreted and enforced by the District Court, that they keep petitioners in constant jeopardy of contempt, with no basis for determining what action in the management and operation of the railroad may be a violation of the injunction.

Every decree of a court should be specific and certain in its character, so that it should clearly apprise the parties to the proceedings of their rights and duties thereunder. This is particularly true of injunctive orders whereby parties are directed to or restrained from the performance of acts under penalty of contempt.

> *New Haven R. R. vs. Interstate Commerce Commission*, 200 U. S. 361, 404:
>
> "The contention, therefore, is that whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular it is the duty of the court, not only to enjoin the carrier from further like violation of the act, *but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction.* To state the proposition is, we think, to answer it. *Swift & Company v. United States*, 196 U. S. 375. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a viol[illegible]n

of the anti-trust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives contenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *In re Debs*, 1658 U. S. 564, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen."

Swift and Company vs. United States, 196 U. S. 375:

"The law has been upheld, and therefore we are bound to enforce it notwithstanding these difficulties. On the other hand, we equally are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt. We cannot issue a general injunction against all possible breaches of the law. We must steer between these opposite difficulties as best we can."

St. Louis Mining and Milling Company vs. Montana Mining Company, 58 Fed. 129:

" 'The writ, as a general rule, ought to contain a concise description of the particular acts or things in respect to which the party is enjoined, so that there may be no misapprehension on the subject.' *Whipple v. Hutchinson*, 4 Blatchf. 190. This rule was ezpressed in the above case by Justice Nelson. The rule is approved in High Inj. (1st Ed.) p. 26, Sec. 38. In reason, it ought not to be left to a defendant to ascertain from what acts he is enjoined."

Avery vs. Onillon, et al., 10 La. Ann. 127:

"Spofford, J. The injunction was properly dissolved for its vagueness.

"It was sued out to restrain the defendant from trespassing—

" 'Upon the lands of Wm. H. Avery, lying in the rear part of his plantation and in that part of the parish of Iberville known as Manchac, about seven miles below the town of Plaquemine, and on the left bank of the Mississippi river, by cutting timber upon the same, etc.'

"No other description of the location, extent or boundaries of the land is given in the petition, affidavit, order, or writ.

"Such an injunction could only operate as a snare to the defendants. It did not notify them what lands the plaintiff claimed as his, and deprived them of all recourse in damages, if it should turn out that the plaintiff was really seeking to restrain them from what they had a right to do."

Robinson vs. Clapp, 32 Atlantic Rep. 939:

"The court also erred in granting an injunction in so indifinate terms. It is impossible to lay down any precise rule of universal application upon the subject. But the person enjoined is entitled to know with reasonable certainty what acts he may and may not do without making himself liable as in contempt of an order."

Baldwin vs. Miles, 20 Alt. 618:

"For these reasons we think the injunction order was meant to, and that it does in fact, regulate the phosphate manure business and nothing else; and that upon the finding of the court below judgment should have been rendered for the defendants. If, however, we are wrong in this conclusion, then we think the language of the injunction is too vague and indefinite to be the foundation of proceedings in contempt. Such an order should be clear and certain in its terms, so that the party upon whom it is served may readily know what he can or cannot do thereunder, seeing that the consequences of a breach may subject him to loss of property and imprisonment. As this court said in the case of *Manufacturing Co. v. Rogers*, 38 Conn. 125: 'Injunctions ought to be made plain and distinct. No respondent is to be entrapped into a contempt by vague or general orders.' "

Lone Star Salt Co. vs. Blount, et al., 107 S. W. 1163:

"These paragraphs of the judgment, in a general way, enjoin the defendant from any act that would restrict it in the free pursuit of its business in the manufacture or sale of salt anywhere, or for the purpose to fix or maintain any standard or figure whereby the price of salt be in any manner affected, controlled, or established, etc. The business of defendant was the manufacture and sale of salt, and *the effect of said order was generally to prohibit the violation of the anti-trust laws of this state, without specifying what acts would constitute such violation.* The petition set out in what respects the defendant was violating said law, naming the parties with which defendant was engaged in violating the laws, and with whom the conspiracy was formed to carry the unlawful purposes into effect, but the decree does not name the parties with whom it was connected, or what particular combination or conspiracy the defendant must abstain from engaging in or carrying out. It leaves the defendant to determine at its own risk what course to pursue. The decree of the court should specify with certainty the particular acts to be done in order that the party enjoined will have a definite guide by which to shape his conduct. 'An injunction should contain within itself sufficient * * * to apprise the party upon whom it is served what he is retrained from doing, without the necessity of his resorting to the bill on file.' *Spelling on Injunctions*, vol. 2, S. 1123 (2d Ed.); *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485, 13 L. R. A. 321."

Regan vs. Sorenson, et al., 100 N. W. 1095:

"The fact remains that the order does not clearly specify, either directly or by reference to the record, what acts are forbidden. When an injunctional order is so indefinite and uncertain that the court, with the entire record before it, has difficulty in understanding its meaning, it would be manifestly unreasonable to expect layman to interpret it correctly, and be governed by its provisions at the peril of severe punishment for disobedience. We hold that the order appealed from should be set aside because it is unintelligible, and therefore decline to explore the record in search of allegations and proofs which might be found sufficient, to present some of the questions of law argued by counsel."

The final injunction in this case was framed in the general language of the statute without any specification of the acts and things petitioners should do and should not do. The injunction provides that the railroad company be perpetually enjoined from

> "in any way or manner interfering with, influencing, intimidating or coercing the plaintiff Harper or any of the approximately seventeen hundred clerical employes * * * with respect to their free and untrammelled right of selecting and designating their representatives for the purposes of considering and deciding any and all disputes between said clerical employes and the defendant railroad company; * * * from in any way or manner interfering with, influencing, intimidating or coercing the plaintiff Harper, or any of said clerical employes herein referred to with respect of their free and untrammelled right of self-organization."

To this injunctive order is added the following supposedly explanatory paragraph, which, we believe, is no more enlightening than the body of the injunction:

> "Nothing in this injunction shall be considered or construed as authority to prevent any employe of said defendant Railroad Company, in the class referred to, from organizing, joining, promoting, or fostering as many unions as he or they (meaning such employes in the class referred to) may desire, and in any way which he or they may desire, and with the assistance and aid of any of his fellow employes in any way and to any extent that said employes (in the class referred to) may desire nor from proceeding as to them may seem best, in the selection or designation of representatives as aforesaid, nor shall anything in this injunction be consid-

> ered or construed as authority or permission for any officer or agent of said company, or any employe acting for or on behalf of the defendant Railroad Company, attempting to influence or to interfere with said selection or designation of their said representatives, or their right to self organization as herein referred to, upon any pretext that they are acting individually and not as representatives of said defendant corporation."
>
> (R. 402-404.)

The vagueness and generality of the language of this order, and the fact that it is framed in the vague and general terms of the statute are evident on first reading. It violates the rule laid down in the above cases that such an order should "contain a concise description of the particular acts or things in respect to which the party is enjoined," and should not be so vague and general in its language "as to put the whole conduct of the defendant's business at the peril of a summons for contempt."

An injunction framed as this one is can "only operate as a snare to the defendant." Petitioners were, and are left to guess what action on their part, in the unrevealed opinion of the Court, would constitute "influence, interference and coercion," and they could never be sure until the trap snapped that they were doing anything contrary to the order. The scope of this order depends wholly on the length of the judge's foot. If he has a long foot, it can be stretched to cover what to the ordinary man would be a most innocent and justifiable act. If he has ashort foot, it may be interpreted so as to cover only things which are positively immoral or legally wrong.

The viciousness and injustice of such an order, and the unexpected interpretation that may be placed upon it are amply illustrated by what happened to petitioners in this case with respect of the preliminary injunction. Although advised by counsel, they could not avoid the snare deftly hidden in the foliage of the generality of the order.

No one, we venture, would ever conceive that an injunction against the use of influence, interference and coercion could be interpreted to prohibit the exercise of universally recognized legal and constitutional rights. Surely, everyone would say, the Court did not mean to do that. The company's officials were advised by counsel that certain acts contemplated by them were within their inherent, nay constitutional rights, and could not possibly be in contempt of the Court's order. They were advised by.counsel that they had the constitutional right to hire and fire, with or without cause, any employe; that a pass privilege was a mere act of favor which could be withdrawn at will; that they had a right to deal with their employes individually or collectively through a committee, who proved to their satisfaction that it represented a majority of the employes. But lo, and behold! they found themselves suddenly facing the yawning doors of a jail, and that the learned judge had a very different, but up to that time undisclosed and undiscoverable, idea of the scope of his order.

An injunction so worded, and subject to varying interpretation is a dangerous snare even to the most wary, and is contrary to the first principles of justice. The peril still hangs over petitioners. They are under the suspicion of the Court, and all of their conduct in the operation of a great railroad must be based upon their guess, from time to time, and for time evermore, as to what the Court may think about it.

The injunction says that the officials of the railroad must not exercise influence or interfere with, or coerce its employes in the free and untrammelled right of self-organization and of choice of representatives. They are left, however, to guess what the Court's definition of these terms is, or will hereafter be.

The dilemma that they must constantly face is what action would or would not, in the opinion of the Court, amount to "in any way or manner influencing, interfering with, intimidating or coercing" an employe in respect of his free and untrammelled right of selecting his representatives, or right of self-organization. If an officer express an opinion, though solicited by the employe, that a certain person would make a better representative of the employes than another; or express the hope or wish that a certain person be, or not be selected as representative by the employes; or express the opinion that a certain, rather than another, organization would be best for the employes' interest; or if an officer, cultivating friendly personal relations, should, consciously or unconsciously, obtain a certain dominion over the opinions and actions of the employe; or if an officer granted favors to a loyal and industrious clerk, who happened not to belong to the Brotherhood, and refused similar favors to one whom he did not deem worthy, who happened to be a member of the Brotherhood, all or any of these things might, if the word "influence" be given an unrestricted meaning, fall under the ban of the injunction. If an officer should threaten with discharge an employe who happened to be a member of the Brotherhood, whom he considered was devoting much of his time to solicitation and propaganda in behalf of the Brotherhood to the neglect of his duties, this might be considered an act of intimidation and subject petitioners to a rule for contempt. The situation of petitioners under this vague and general injunction is intolerable.

Petitioners cannot in common justice be required to interpret this order, and to guess at what is hidden in the Court's mind in respect of its scope, and at the peril of the jail. If for none of the other reasons we have urged at this bar, at least for the reasons we are now discussing, this order should be vacated.

As unjust, inequitable and illegal as is the injunctive order as written, it is much more so as interpreted and applied by the District Court. We can only form an idea of the scope of this injunction by the interpretation the Court placed on it in adjudging petitioners in contempt.

First of all, the District court held Waid, who was sick and absent from duty from July 1 to September 15, 1927 (R. 518), the period when all, or practically all of the transactions held to have been in violation of the injunction occurred, equally responsible and equally to be punished with the other petitioners.

But let us examine the various things which the Court says were violative of his preliminary injunction, which, except in an unimportant particular, is identical with the final injunction (Record, pp. 266-267).

> (1) "Completely to disestablish the Association as now constituted as the recognized representative of its clerical employes and to reinstate and re-establish the Brotherhood as the recognized representative of said employes."

By this the District Court, we submit, is doing the very thing which he found so reprehensible and illegal if done by petitioners, to-wit, interfering in the free right of self-organization and choice of representatives on the part of the employes, for even if the Association should hereafter appear and prove by written authorization that it represented ninety-five (95%) per cent of the clerical employes, yet petitioners could not recognize it, as the lower court is firmly of the opinion that it was formed under the *aegis* of the company. Before

Petitioners are permitted to recognize the Association it must first break up its organization, and dissolve and presumably form a new association, free of influence, interference or coercion by the defendant, in some manner and form satisfactory to the Court. But it might be readily surmised that if they did all this, and the Court should find in the new organization the previously "influenced or coerced" employes, who are members of the present association, he might hold this new organization, a majority of whose members might be the so-called "influenced or coerced" employes, was tainted with original sin, and might send the defendant's officers to jail if they recognized the new association.

Moreover, he compels the company to recognize the Brotherhood as a representative of the 1850 odd employes of the company, notwithstanding the fact that it might be able to produce the authorization of only a small minority of the employes; and this the company must do until such time as, in accordance with the Court's idea, the remaining majority, without any suspicion of influence, interference or coercion on the part of the company, form a new organization, otherwise they shall stand unrepresented or represented by persons not of their choice. The Court is in effect forcing by its process a large number of the company's employes to submit to a representation not of their choice. If this be not interference with, influencing or coercing the defendant's employes, on the part of the Court, in the free and untrammelled right of self-organization, and the free and untrammelled right of choice of representatives, we are at a loss to otherwise describe it.

> (2) "Cease to permit officers and representatives of the Association to organize, promote, manage, and attend to the business of said Association, or any organization said clerical em-

> ployes hereafter form, on the time and under the pay and at the expense and under the *aegis* of the authority of the defendant railroad company and its officers, unless a similar privilege is accorded to the officers and representatives of the complainant Brotherhood."

This part of the order is directly in conflict with the decision of this Court in the case of *Penn. Federation No. 90 vs. Penna. R. R. Co.*, 267 U. S. 203. We ask the Court to compare the things prohibited here with the things that it was charged in that case the Pennsylvania Railroad was doing, which things the Court, while saying that they were done in defiance of the decision of the Railroad Labor Board, yet said were beyond the control of the court by injunctive process.

Moreover, this ruling deprives the company of any control or discipline of its employes. It is frequently the case that an employe may be granted leave of absence from work without deduction from pay, especially if the employe is worthy of such consideration and the service be not affected thereby. But if an officer of the company does grant such a favor to a non-member of the Brotherhood perforce he cannot refuse the same privilege to a member of the Brotherhood, even though the officer might consider the man unworthy of such consideration, or that his absence would affect the service. He must at the peril of a summons for contempt against the company keep the scales exactly balanced, not only today and tomorrow, but forever more. It may be said that the Court would not listen to such trival compliants. If it should develop that the nonmember used his vacation time in promoting an organization in opposition to the Brotherhood, it is not beyond the bounds of possibility that the Court would. His action on the rule for contempt indicated an utter lack of confidence in the good faith of the company in doing the things he complained of, and all of its protestations of honest intentions might be in vain. He would not believe the company's officials in respect of the discharge of Ginsberg and others, though the facts of their delinquencies were not disputed.

> (3) "Restore H. W. Harper and John W. Walker to the service of the defendant company without prejudice and without loss of seniority rights."

The right to hire and fire whomsoever it pleases is an absolute right guaranteed to the defendant by the Constitution of the United States. *Adair vs. U. S., supra.* If an absolute legal right, the motive for its exercise is utterly immaterial, and even though the Court may have had the suspicion that these men were discharged from the company's service rather than more lightly punished, because of their activities in the affairs of the Brotherhood, yet it was powerless in the premises to make any such order as this.

> (4) "Restore to said H. W. Harper and John W. Walker the pass privileges over the defendant company's lines which they enjoyed prior to August 6, 1927."

This is one of the most extraordinary features of this extraordinary injunction. There is no law imposing upon the company the obligation to give any one free transportation over its railroad. It may give or withhold the privilege whenever it sees fit, and for any reason it sees fit. The right to demand compensation for transportation over its railroad is a property right, which cannot be taken away, certainly in the absence of express legislation (which would be of doubtful constitutionality) by any decree of court.

> (5) "Restore R. E. Stotzer, B. C. Hudson and Charles Ginsberg to the services as employes of the defendant company without prejudice and

> loss of seniority rights and to make whole such parties for any loss of pay they may have sustained by reason of their discharge in violation of the temporary injunction herein and in contempt of the court."

What we have said regarding the discharge of Harper and Walker applies to this part of the order.

It will be seen that the District Judge, by his injunctions, has practically put the whole conduct of Petitioners' business under his supervision and control, insofar as concerns relations with clerical employes, and at the peril always of a summons for contempt, if at any time their conduct in that relation should not conform to what the Court may think it should be. Petitioners will only know when they face the bar that they have acted contrary to the Judge's idea of what their conduct should have been in any given case. If it happen that a contest be on between rival organizations of employes, they dare not discharge or refuse employment to any member of the Brotherhood for fear that their motive may be called into question, and the charge of exercising influence, intimidation or coercion be lodged against it, especially if it, during such time, hire only non-members of the Brotherhood. Before it can recognize or deal with any organization of its clerical employes, other than the Brotherhood, it must, at its peril, previously apply to the Court and convince him that there is no taint or suspicion of influence, interference or coercion on the part of the company in the formation of such organization, and get the Court's approval of the character and composition of such organization. If for any reason sufficient to him he should refuse to permit the company to deal with such new organization, even though it represented a majority of such employes, there is no method by which the correctness of his finding could be reviewed. It thus appears that the Court could so interfere with the rights of these employes as to be tantamount to the very action which he condemns in the defendant.

We submit that even if this Court should think that an injunctive order might legally have issued in this case, yet that the order made is unjust and inequitable, and as interpreted and applied is beyond the power and authority of the Court.

The argument is made that the contempt order was merely for the purpose of restoring the *status quo ante*, and that the Court could issue orders for this purpose that it could not have made originally. It may be true that a court of equity may issue orders for the purpose of restoring the *status quo ante*, but only to restore a *status* which the plaintiff was originally entitled to have remain static. The acts ordered undone by the Court in its contempt order must necessarily have been forbidden by the original temporary injunction, else they could not have been violations of it. The Court had no power to order undone that which it could not have originally forbidden to be done, and nothing in the cases upholding the right to restore the *status quo ante* is to the contrary.

XI.

CONCLUSION AND BRIEF DISCUSSION OF OPINIONS OF COURTS BELOW.

In conclusion it is deemed proper briefly to discuss some parts of the opinions of the courts below.

The opinion of the District Court, filed February 6,1928, *in the contempt proceeding*, 24 Fed. (2nd.), 426:

The court, speaking of the recognition of the Association, says: "It must be borne in mind that this is old straw twice unsuccessfully threshed out before the Labor Board * * *." (R. 253.) Here and, indeed, throughout the opinion, the Court supposes that the decisions of the Labor Board were enforced and enforcible like the decree of a court, notwithstanding the *Pennsylvania Railway case*, 267 U. S. 203.

The Court, in a note appended to the foregoing, says: "On November 14, 1923, * * * the defendant Torian, for the Company, wrote Harper as follows: 'At conference yesterday, I advised that the carrier would comply with Decision 1971 of the United States Labor Board, and recognize the organization of the Brotherhood of Railway and Steamship Clerks until such time as the majority of the clerical employes by secret ballot, select other representation.' " (R. 254) (24 Fed. (2nd) 432). The fact is that the letter quoted from was addressed jointly to the representative of the Association and to Harper, and that its meaning has been distorted by changing a comma to a period and omitting the rest of the sentence and of the letter. It was not, as the court implies, an agreement to abide the decision of the Labor Board, but was a strong and almost bitter protest against it. (R. 486-8; this brief p. 24). Nevertheless, though the decision was not legally binding, the Railroad Company went along with it, thus proving the total absence of the determination attributed to it by the Court.

The Court says: "Many affidavits were submitted on the hearing for the injunction which abundantly established that the activity of the officers and agents of the Railroad Company in securing authorizations was inspired by the company, while the record teems with evidence that the Association was the favored child of the defendant company, and if not created, was largely sponsored, promoted and maintained by it." (R. 255.) In fact the affidavits referred to disclose that an assistant superintendent spoke to one employe in favor of the Association (R. 65-7), an agent to two (R. 62-4) and an assistant agent to eleven (R. 48-61; 411; 412; 678), all unsuccessfully. At the final hearing the assistant agent testified that he spoke in favor of the Association to 92 clerks, of whom only 8 signed authorizations for it, none of them appearing reluctant to do so. (R. 727-732.) The Association was created in 1923, and reorganized July 11, 1927 (R. 982-5), solely through the efforts of the clerks themselves. The activities of these men were known to the officers of the railroad company having official positions as high as that of division superintendent, and no objection was made by said officers. Their efforts were made in part during working hours and on time for which they were paid by the Railroad Company. (R. 735-763, 764, 1021-30, 1032-5, 1036).

The Courts says: "Not only did the Railroad Company, with a sheer and gratuitous wantonness of spirit, reject the offices of the Board of Mediation * * * but before the ink was hardly dry upon the order of injunction, proceeded to nullify it by recognizing as truly representative the Association, all of whose authorizations had been filed with the defendant Torian before this suit was filed, and the most of which had been obtained, as found by the court, by the use of means in violation of the statute." (R. 256). In fact the offices of the Board of Mediation had terminated at the time of the recognition of the Association, the Mediator having proposed arbitration and it having been declined by the Company because it did not believe the Brotherhood in fact represented the employes. (R. 819, 851-2), and also by the institution of this suit by the Brotherhood. The Secretary of the Board of Mediation requested the Company to submit to mediation while the Brotherhood was suing it (R. 644-651)! No question of mediation was involved under the temporary injunction, which was solely against influence, interference or coercion. The Court was obviously in error in its statement that any of the authorizations of the Association had been obtained by the use of means in violation of the Statute.

The Court says. "And this recognition was accorded, and action taken under it, in the face of the statute and of Torian's affidavit filed herein, that he would not consider these authorizations until the Board had so relinquished." (R. 256-7). The recognition was clearly not in the face of the statute. It was not in violation of the statements of Torian's affidavit because its clear effect was not "that he would not consider these authorizations until the Board had so relinquished," but that he would consider them as soon as the mediation was disposed of or dismissed by the Board. This was a promise to the Association, not to the Brotherhood or to the Court. (R. 415).

Says the Court: "While with a fell and steady purpose, by striking at the heads of the Brotherhood and of those who were active in it, by depriving them of their positions and power, to kill what it had scotched, it set itself about, with a callous indifference to the spirit as well as the letter of the statute and the order, the task of not only more firmly seating the Association of Clerical Employes, but of crushing any effort on the part of other employes to secure other representation, if they so desired, in the face of Torian's affidavit filed in the original hearing." (R. 257.) In fact the Company merely ceased to furnish the heads of the Brotherhood with ammunition—free passes—to be used against it. In fact, those who were active in it referred to by the Court are the three employes who were discharged for adequate cause, as heretofore shown in this brief. In fact, the action taken by the Company was not in the least in conflict with the affidavit of Torian referred to in the opinion and in part quoted in the note. More firmly seating the Association means only its recognition and the granting to the employes, at its instance, an adjustment in pay amounting to an increase of some hundred thousand dollars per year.

The Court proceeds: "In short, upon a foundation laid in direct violation of the statute, they have sought to erect a superstructure of exclusive representation, and in the face of a statute and an injunction designed to secure the observance of the fundamental maxim, *Audita alteram partem*, they have gone about to arrange it so that the railroad would be in a position of surely having a vote on both sides of the table, its own side and that of its employes." (R. 257-258.) The statute has been discussed, as has the matter of exclusive representation. There is no evidence that the company had undertaken to arrange that it would "have a vote on both sides of the table." The contrary is clearly demonstrated by the fact that the company expected to make an adjustment of pay of its employes through the Association by granting an increase of $75,000. per annum (R. 772), whereas the Association succeeded in obtaining an increase of $100,000. per annum. (R. 105, 176.) The Court no doubt means to refer to the maxim "*audi alteram partem*."

The Court proceeds: "In view of all these facts, and of the further controlling and dominant fact that in the face of the agreement and understanding that the Brotherhood should continue to represent the clerks until by secret ballot other representation was selected, it appears that organizers of the Association of Clerical Employes have been sent out on company time and on company pay and with company consent and approval, to organize the Association, while officers of the Brotherhood have been discharged from the service and excluded from wage conferences, members of the Brotherhood have had their pay docked for the time spent on its business, and other members have been dismissed from the service it would be a sticking in the bark to discuss in detail the evidences with which this record teems of a deliberate violation of this injunction, legalistic perhaps through the advice of counsel, but none the less a violation." (R. 259.)

In truth the "agreement and understanding" is the letter of November 14, 1923 (R. 486-8) hereinbefore referred to and in large part set out. The change of the comma to a period, and the elimination of the remainder of the sentence and of the letter do make it appear to be an agreement. The whole letter, and even the whole sentence disclose that it is not.

There is no evidence that organizers of the Association had been sent out by the company, though it is a fact that no deductions from their pay were made while so engaged. It is, of course, a fact that the company did not object to this action, and that it in fact approves the formation by the employes of their organization. The officers of the Brotherhood were not discharged in any proper or exact sense. They had rendered no service for long periods of time and were merely dropped from the rosters. The wage conferences from which officers of the Brotherhood mere excluded were conferences between officers of the company and of the Association.

The docking of pay of the members of the Brotherhood was, as stated by the court, for time spent on the business of the Brotherhood and not of the company.

The dismissal from the service of members of the Brotherhood was for adequate cause. It could lawfully have been for any cause or no cause.

The foregoing is the evidence "with which this record teems."

The opinion on Motion to Dissolve and to Modify Temporary Injunction, Filed April 19, 1928. 25 Fed. (2nd) 876:

In this opinion the court says: "There never comes a time under that statute when the defendant perfects the right to force upon employes any representative of its choosing, whereas here the record teems with evidence not only of contracts between the Railroad Company and the Association for sole representation, but of continuing acts on the part of the company designed and tending to disrupt, disintegrate and destroy the Brotherhood, while establishing in the seats of the mighty the Association." (R. 389.)

The evidence with which the record is said to "teem" has been fully set out. It need not be here repeated. It discloses only lawful action on the part of the Company and its officers.

In the same vein the Court proceeds: "One of the Association's chairmen, all of whom are chief clerks to the management testified that the growth of the Association had been due to its recognition by the Railroad and the refusal to recognize the Brotherhood, and he naively remarked that if this suit went in favor of the company, the Association would be able to take complete control, whereas, if it went the other way, the Association would fall; while others testified that if left to a vote uninfluenced by the company, the employes would not select the Association as representative, while all the other testimony established the continuing character of the interference by the defendant company, in the support and maintenance of the company union for its benefit and advantage, and the barring out of any and all other representation." (R. 389.)

It is assumed that by "chairmen" the court means officers. The General Chairman of the Association at the time of the hearings and now is F. C. Ehlinger, Chief Clerk in the office of the Division Superintendent at Ennis, Texas. (R. 431.) The Vice General Chairman at the time of the first two hearings was A. G. Baker, a Shop Accountant at Houston, not a chief clerk (R. 552, 982), and at the time of the final hearing and now A. J. DeTrafford, a clerk at Lafayette, Louisiana, not a chief clerk. (R. 697.) The General Secretary-Treasurer is D. D. Wade, a clerk, not a chief clerk. (R. 456).

The testimony first referred to by the court is that of D. D. Wade and is in fact as follows:

"With reference to whether I circularized the clerks telling them that we are the ones that could represent them and that the Brotherhood can't: I don't know that I have asserted that the Brotherhood can't. I would assume, however, that the Association has been recognized by the management of the railroad. I stated that to them, that they had better join up with us because they couldn't do any good with the Brotherhood. As a result of that and with the solicitation in person, I have been getting members right along. (R. 1028) * * * With reference to whether the membership of our organization is in a general way comparable with those authorizations: I will tell you, we had quite a few of those authorizations, fellows that authorized the Association to represent them that have not as yet joined the Association due to the fact that the whole thing has been in litigation. They don't want to involve themselves one way or the other. They are just waiting. I had one of them tell me if the railroad company wins out in the suit, we will be with you 100 per cent, but until the whole thing wins out one way or the other, they are not going to join one way or the other." (R. 1030.)

The testimony of the others (on examination by the court) is in fact as follows:

F. C. Ehlinger: "I do not think that a fair ballot could be obtained of the clerks as to which of these organizations they believe should represent them; for the simple reason that the Association is a radical departure from the old union idea and a large number of the crafts are under the union control at this time and have their different organizations and exercise influence and coercion over the clerks involved to the extent that they would have them work against the Association instead of with it, even though they might be favorable to it. It has prevented a large number of them from joining us. (R. 760.) * * * "I feel that while it may be that on our side the railroad is working for us as the Brotherhood says, that on their side the other unions are working for them That's our hardest trouble. I feel that if they did what they wished, as a matter of fact we would not really get them in our organization. I think that the majority of the clerks, if they expressed their wish about it, would probably want the Association, but whether they would have the nerve to really be for it or not in the face of some of the union operators being directly over them, knowing he didn't vote for the Brotherhood, it would not be long before he could give him a lot of trouble. He could give him more trouble than the company could." (R. 761-762.)

D. D. Wade:

"The organization is growing every day. The clerks surely do want our organization to represent them rather than the Brotherhood. If outside interference was kept away, in the event provision was made by the court to take their evidence either by ballot or otherwise, the clerks would vote for us and not for the Brotherhood. I mean outside interference from the Brotherhood orders. I really do think the majority of the clerks really prefer our organization to the other. * * * If the other brotherhoods' interference was eliminated the Association would have an overwhelming majority, but with the other Brotherhoods interfering, keeping the men from joining, making them afraid of their jobs and so forth, clerks in offices where there might be three clerks in there and two of them belonged to the Brotherhood and one of them did not belong, he would be afraid to join because they would make the work so hard for him, make his life miserable while he is there." (R. 1029.)

J. C. McDaniel: "I can only speak of the condition of mind of my immediate clerical force because I have been on duty all the time. They are still just like they were in 1923 and 1924. They don't want representation by the Brotherhood of Railway Clerks. (R. 1057) * * * All of them belong to the Association (R. 1064.) * * * Given an expression of their opinion either by ballot or otherwise, would I think all be in favor of the Association. * * * With reference to out on the line where one or two clerks are under the orders of Railway Telegrapher Agents: During the time I was on the line I found there was lots of opposition. Usually a telegrapher or operator agent belongs to the National Organization and most of those one or two clerk stations, why, they belong to the Brotherhood. They are scared not to." (R. 1065.)

"All the other testimony" referred to has been heretofore fully stated.

The court concludes: "This limitation (that the Brotherhood should be deemed sole representative until displaced at an election to be held under direction of the court) was drawn from not only the established practice and rulings of the Labor Board but from the letter of the Railroad Company through Torian, its representative, dated November 14, 1923, and thereafter acted upon:

"In conference yesterday I advised that the carrier would comply with Decision 1971 of the United States Labor Board and recognize the organization of the Brotherhood of Railway and Steamship Clerks until such time as the majority of the clerical employes, by secret ballot, select other representation'."

Again the court has quoted from the letter already referred to, again with the comma changed to a period, again with the rest of the sentence and of the letter omitted, and again with the whole sense changed. (R. 486-8.)

Opinion on Final Hearing, Filed April 19, 1928: 25 Fed. (2nd) 873.

This opinion in the main but echoes those which went before. In practical effect it makes but one new point: "In addition, the genesis and motive of the entire activity of the defendants in organizing, promoting, and maintaining the Association, and in endeavoring to disrupt and unseat the Brotherhood as representative, is made clear and plain through a letter written by Mr. Lull, one of the defendants in the contempt proceedings and Vice President of the Railroad Company, to Mr. McDonald, its President, on May 24, 1927, prior to the activities complained of in this suit." (R. 395-396.)

In fact, as has been heretofore shown the respondents did not organize the Association, did not promote it, and did not maintain it, except by refraining from making deductions from pay of Association members, as clerks, while devoting some part of their time to its business, and in refunding to them a few small items of expense incurred. The letter referred to simply and plainly discloses that the Executive Vice President of the Railroad Company believed that the Brotherhood did not in fact represent the clerks and the Association did; that he believed the demands of the Brotherhood were unreasonable, and that he wished to make a reasonable settlement of the request for an increase in pay. It discloses that he was considering, as was his duty, the interest of the public and of the owners of the property, as well as of the employes. (R. 772-4.)

The majority opinion of the Honorable Circuit Court of ***Appeals***, 33 *Fed.* (*2nd*) 13, but echoes the statements of the District Court, without examining the facts, though grave constitutional questions are involved. (Ohio Valley Water Co. vs. Ben Avon, 253 U. S. 287.) The dissenting opinion, on the point discussed is believed to contain the law of the case.

We pray that the decisions of the Lower Courts be reversed and the bill dismissed; but in any event, that the final injunction be not allowed to stand, framed without specification of the particular acts enjoined; and that the things petitioners were ordered to do in the order adjudging them in contempt be declared illegal and beyond the power of the District Court.

J. H. Tallichet.
C. R. Wharton
Calvin B. Garwood.
John P. Bullington.
Solicitors for Petitioners.

H. M. Garwood,
Walker B. Spencer
of Counsel.
Houston, Texas, April 2, 1930.

APPENDIX "A".

RAILWAY LABOR ACT.

AN ACT To provide for the prompt disposition of disputes between carriers and their employees, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

DEFINITIONS.

SEC. 1. (*U. S. Code, Sup. II, title* 45, *sec.* 151.) When used in this Act and for the purposes of this Act:

FIRST. The term "carrier" includes any express company, sleeping-car company, and any carrier by railroad, subject to the Interstate Commerce Act, including all floating equipment such as boats, barges, tugs, bridges and ferries; and other transportation facilities used by or operated in connection with any such carrier by railroad, and any receiver or any other individual or body, judicial or otherwise, when in the possession of the business of employers or carriers covered by this Act: *Provided, however,* That the term "carrier" shall not include any street, interurban, or suburban electric railway unless such a railway is operating as a part of a general steam railroad system of transportation, but shall not exclude any part of the general steam railroad system of transportation now or hereafter operated by any other motive power;

SECOND. The term "Adjustment Board" means one of the boards of adjustment provided for in this Act;

THIRD. The term "Board of Mediation" means the Board of Mediation created by this Act;

FOURTH. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

FIFTH. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official, in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* that no occupational classification made by the order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

SIXTH. The term "district court" includes the Supreme Court of the District of Columbia; and the term "circuit court of appeals" includes the Court of Appeals of the District of Columbia.

This Act may be cited as the Railway Labor Act.

GENERAL DUTIES.

SEC. 2. (*U. S. Code, Sup. II, title* 45, *sec.* 152.)

FIRST. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

SECOND. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute.

THIRD. *Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.**

* NOTE: This paragraph italicised by us.

FOURTH. In case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the railroad line of the carrier involved unless otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

FIFTH. Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto.

BOARDS OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS.

SEC. 3. (*U. S. Code, Sup. II, title* 45, *sec.* 153.)

FIRST. Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employes. * * * *

SECOND. Nothing in this Act shall be construed to prohibit an individual carrier and its employees from agreeing upon the settlement of disputes through such machinery of contract and adjustment as they may mutually establish. * * *

FUNCTIONS OF BOARD OF MEDIATION.

SEC. 5. (*U. S. Code, Sup. II, title* 45, *sec.* 155.)

FIRST. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Board of Mediation created by this Act, or the Board of Mediation may proffer its services, in any of the following cases:

(a) A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

(b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions;

(c) Any other dispute not decided in conference between the parties.

In either event the said board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable adjustment through mediation shall be unsuccessful, the said board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act), to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act. * * *

PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS.

SEC. 6. (*U. S. Code, Sup. II, title* 45, *sec.* 156.) Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. Should changes be requested from more than one class or associated classes at approximately the same time, this date for the conference shall be understood to apply only to the first conference for each class; it being the intent that subsequent conferences in respect to each request shall be held in the order of its receipt and shall follow each other with reasonable promptness. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Board of Mediation have been requested by either party or said board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this

Act, by the Board of Mediation, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation.

ARBITRATION.

SEC. 7. (*U. S. Code, Sup. II, title* 45, *sec.* 157.)

FIRST. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise. * * *

SEC. 8. (*U. S. Code, Sup. II, title* 45, *sec.* 158.) The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act; * * *

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided, however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Board of Mediation or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

SEC. 9. (*U. S. Code, Sup. II, title* 45, *sec.* 159.)

FIRST. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

SECOND. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties. * * *

EIGHTH. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

EMERGENCY BOARD.

SEC. 10. (*U. S. Code, Sup. II, title* 45, *sec.* 160.) If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this Act and should, in the judgment of the Board of Mediation, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Board of Mediation shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is hereby authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President. no change, except by agreement, shall be made by the parties to the controversy in the condition out of which the dispute arose. * * *

APPENDIX B.

Number of Clerks who authorized the "Association of Clerical Employes" to represent them:

These authorizations were produced in open court and counted, under order of the court, by the clerk, the number being 937. (R. 468.) One signature which appeared to be blurred or partly erased, was not counted (R. 544), but was proved to be valid (R. 521, 531), thus making the number 938. Of said number there were five duplications of signatures, one signature of a negro janitor and one of a freight trucker, which were not counted or considered by the Company. (R. 521.) This made the number of clerical employees whose authorizations were counted and acted on 931, out of a total of 1,855.

Complainants filed an affidavit of H. W. Harper, alleged that 912 of said 931 authorizations were invalid and should be eliminated for the following alleged reasons, after each of which the facts with respect to said matter are set out:

(1) Brotherhood claims: That 661 of said authorizations name individuals only as representatives; that 422 are not dated, and that 90 do not name any particular person as representative. (R. 186-219.)

The facts: The named individuals met and elected representatives, who in turn met and elected officers of the Association; that all of the authorizations were procured immediately preceding the meetings aforesaid, this being known to all parties, and that said authorizations which do not name any particular person, nevertheless clearly express the intention of the signer, which was carried into effect by his representatives. (R. 522, 737-738, and 982-985.)

(2) Brotherhood claim: That 110 of the signers of

authorizations are members of personal office forces in various division offices of the Railroad Company and are, therefore, not eligible to membership in any clerks' organization. (R. 188.)

The facts: Personal office forces are clerical employees, eligible to membership in clerks' organizations (R. 224-225 and 524-525); at least one personal office force employee has been an officer of the Brotherhood (R. 538); while at a ballot taken in 1923 for the selection of clerks' representatives, personal office forces were not permitted to vote, this was solely for the reason that the United States Railroad Labor Board held that if they were permitted to vote, they must be subject to all clerks' rules, including those relating to overtime and seniority, whereas it is necessary that such personal office force employees be selected for their ability rather than in accordance with seniority, and their rates of pay are fixed to cover average overtime (R. 536-538); unless eligible to membership in clerks' organizations, they cannot belong to any organization. (R. 538-539.)

(3) Brotherhood claim: That 32 of the signers of authorizations are messenger boys, 12 employees at the creosote works of the Railroad Company, 7 employees of Lake Charles & Northern Railroad, 7 employees in the dining car department of the Railroad Company, 6 truck drivers, 3 private branch exchange telephone operators, 2 baggage agents, one a Mexican janitor at El Paso, one an elevator operator, one an assistant freight agent, one an assistant to the terminal freight agent at New Orleans, and one an auto messenger, and all (total 74), therefore, not eligible to membership in clerks' organization. (R. 188 *et seq.*)

The facts: All said employees are clerks or clerical employees (R. 227-229); the list of clerical employees entitled to vote agreed on between the Company, the

Association, and the Brotherhood prior to the ballot under the direction of the Labor in 1923 includes messengers, office boys, callers, mail boys, baggage agents, automobile messengers, assistant baggage agents, private branch exchange operators, clerical employees in dining car department and at creosote works (R. 227-229 and 558); the authorizations presented and relied on by the Brotherhood include dining car department clerks, private branch exchange operators, messengers and office boys (R. 1067-1068); the properties of Lake Charles & Northern Railroad Company are leased to and operated by the Railroad Company, and its so-called employees are in fact employees of defendant Company (R. 228, 542); the janitor at El Paso is in fact a janitor and messenger and, therefore, a clerical employee (R. 228); elevator operators are classed as clerical employees, eligible to membership in either the Association or the Brotherhood, their working conditions and rates of pay being fixed by clerks' agreements (R. 228 and 527-528); the assistant freight agent at Fort Worth, so-called, is under the chief clerk at that station and is in fact a clerk, being styled "agent" merely in order that he may execute bills of lading (R. 229-541); the assistant to the terminal freight agent at New Orleans is simply a clerk, and auto messengers are in fact clerks and governed by clerks' rules and contracts. (R. 229, 542.)

(4) Brotherhood claim: That 52 authorizations are from persons whose names do not appear on seniority rosters. (R. 190-191.)

The facts: There are 55 clerks who authorized the Association to represent them whose names did not appear on seniority rosters, which are issued semi-annually, but each and all are clerical employees, whose names are on the pay rolls. (R. 227, 231-233, 543.)

(5) Brotherhood claim: That one of said author-

izations is from a telegraph operator. (R. 188.)

The fact: This man (R. W. Henderson) is not a telegraph operator, but is a warehouse clerk, and, of course, a clerical employe. (R. 228, 528.)

(6) Brotherhood claim: That one of said authorizations is from an employe of the Gulf, Colorado and Santa Fe Railway Company at Fort Worth, Texas, and not of the defendant. (R. 188.)

The fact: Said person is on the seniority roster of the Railroad Company and one of its clerical employees. The passenger station at Fort Worth is owned jointly by petitioner, Railroad Company and the Santa Fe, who operate it alternately, and the employees of each work in said station irrespective of which is at the moment the operating company. (R. 228-229, 528, 540-541.)

(7) Brotherhood claim: That 76 of the signers of said authorizations are from persons who at a later date had signed papers authorizing the Brotherhood of Railway Clerks to represent them in mediation and that 16 of said 76 had signed express retractions of their authorizations to the Association. (R. 191.)

The facts: Only 45 of said signers of authorizations in favor of the Brotherhood appear to have so signed after signing Association authorizations, none of said autorizations or retractions were presented to or filed with the Railroad Company, and it had no notice of any such authorizations or retractions at or before the date when the authorizations in favor of the Association were received and acted upon. The authorizations with respect to mediation, the form of which is shown on page ...... of this brief, do not conflict with authorizations in favor of the Association, the former being limited to mediation, the latter general in terms. (R. 193-217, 226, 526, 544.)

(8) Brotherhood claim: That 6 of the signers of

said authorizations were not in the service of the Railroad Company on August 5-6, 1927. (R. 187-188.)

The facts: Two of said 6 were merely temporarily absent on the date named, and the other 4 had so recently left the service of the Railroad Company that this fact had not been communicated to the general officers at Houston. All 6 were presented by the Association and received, counted and acted upon by the Railroad Company in entire good faith and without knowledge that said 4 had left the service. (R. 529-530, 534, 545.)

The elimination of said 4 employees from the total of approximately 1,855 and from the total of 931 authorizations would still leave the Association with authorizations from a majority of the clerical employees. That is, the total number of clerks would be 1851, and of authorizations held by the Association 927.

All the evidence showed that the members or officers of the Association in presenting, and the officers of the Railroad Company in receiving, counting and acting upon said authorizations, acted in entire good faith and in the sincere belief that the Association actually represented a majority. (R. 223-224, 523-524, 543-544.) The above mentioned authorizations include only those which were presented by the Association to the Railroad Company on August 5, 1927, and do not include authorizations from 68 additional clerical employees which were in course of transmittal to the officers of the Association on that date and were subsequently received. (R. 752, 982.)

Accordingly it appears:

The number of employees believed by the officers of the Railroad to be represented by the Association was 931

Deducting the 4 recently out of the service and the 16 who had signed retractions, these facts not being known to said officers, this number is reduced by 20, but if so reduced, should be increased by the 68 above referred to, so that the number was actually 979
out of the total of 1,855, that is, a clear majority.

APPENDIX C.

Assignments of Error:

1. The court erred in overruling respondent's motion to dismiss and strike out the information alleging contempt filed herein because the same presents no cause of action or ground of complaint against them, or any of them, and wholly fails to allege any facts showing or tending to show that they, or any of them, have been guilty of contempt of court with respect to the temporary injunction entered herein. (R. 1097.)

15. The court erred in holding respondents in contempt as set forth in the interlocutory decree of the court because the temporary injunction entered herein on August 2, 1927, is beyond the power of the court and void. (R. 1099.)

16. The court erred in holding respondents in contempt because the said order and decree in general terms enjoined and restrained the respondents from interfering, influencing, intimidating or coercing their employes in the matter of selecting representatives and in the matter of the self-government of said clerks and no act or thing done by the respondents or either of them, since the making and entering of said temporary injunction and restraining order, was in violation of the terms of said decree, but each and all of the things done by the respondents, and which the court has now ordered the respondents to undo were none of them in violation of said injunction or restraining order, but were all consistent with the observance thereof and were acts and things done within the rights of the respondents. (R. 1100.)

18. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Completely disestablish the Association of Clerical Employes as it is now constituted as the recognized representative of the clerical employes of the Texas and New Orleans Railroad Company in the States of Texas and Louisiana";

because the court was without power to require the doing of this thing and the acts of the respondents in recognizing and dealing with the Clerks' Association was not a violation of the temporary injunction and restraining order heretofore issued in this case, but was the exercise of a valid legal right resting in respondents. (R. 1100-1101.)

19. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Cease to permit officers and representatives of said association to organize, promote, manage and attend to the business of said association, or any organization of said clerical employes hereafter formed, on the said Texas and New Orleans Railroad Company's time and pay, and at its expense and under the aegis of the authority of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, unless a similar privilege is accorded to the officers and representatives of complainant Brotherhood";

because said acts were not in violation of said injunction but were done in the exercise of rights resting in the respondents, and the court was without power to require respondents to accord to the representatives of the Brotherhood the same treatment they might elect to accord to the representatives of the association. (R. 1101.)

20. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Reinstate and re-establish the said complainant Brotherhood as the representative of said clerical employes in all matters relating to their employment by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera*, substantially as said status was on June 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, and without dictation or interference of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, shall choose another representative or representatives";

because the acts done by the respondents were not in violation of the court's injunction, and because the respondents cannot lawfully be required to reinstate the Brotherhood as representative of its employes, the Railway Labor Act expressly conferring upon the railroad company as the employer, the power and right to deal with any employe or group of employes with reference to wages, conditions of service, etc., by contract or otherwise, and it does not compel the respondents to enter into contracts or agreements, or even to recognize any particular representatives or groups of persons as authorized to act for or represent an entire class of employes contrary to the wishes of all or any part of said class of employes. (R. 1102.)

21. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Reinsate and re-establish said complainant Brotherhood as the representative of said clerical employes in all matters relating to their employment by said Texas and New Orleans Railroad Company, disputes as to pay, working conditions, *et cetera*, substantially as said status was on June

> 1, 1927, until such time as said clerical employes by a secret ballot taken in accordance with the further directions of this court, and without the dictation or interference of said Texas and New Orleans Railroad Company, H. M. Lull, G. S. Waid and J. G. Torian, shall choose another repsentative or representatives";

because the court is without power by its order and decree through a contempt proceeding or otherwise to order and direct the respondents to recognize or deal with a particular group, through the Brotherhood or representatives of the Brotherhood, concerning wages or conditions of service, etc., for any particular or specified period of time, and no act of Congress nor any other law confers upon a majority of any class of employes the right to act for all of such employes of such class, irrespective of the wishes of some of such class of employes who desire to be represented in some other manner. (R. 1102-1103.)

23. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt, to:

> "Restore H. W. Harper and John W. Walker to the service of said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights";

because the court has not the power and authority through contempt proceedings or otherwise to compel the respondents to place H. W. Harper and John W. Walker on the roster of employes of the Texas and New Orleans Railroad Company, nor, as neither of them were in the service of said railroad company on June 1st, 1927, can the respondents be required to restore them to service. No contract relation of any kind existed between the respondents and said Harper and Walker and the most that can be said is that as a matter of grace, while the said Harper had been out of the respondent railroad company's employ for four years or more and the said Walker had been out of the employ of the respondent railroad company two years or more, their names had been permitted to remain on the roster of employes yet, this created no contract right nor any other character of obligation enforcible through the courts in any character of proceeding to compel the continuation of their names on such roster or roll of employes. (R. 1104-1105.)

24. The court erred in holding the respondents in contempt and requiring said respondents as a purging of said contempt to:

> "Restore to said H. W. Harper and John W. Walker the pass privileges over the lines of Texas and New Orleans Railroad Company which they enjoyed prior to August 6, 1927";

because the pass privileges heretofore enjoyed by the said Harper and the said Walker were gratuities and not based upon any contractual right or obligation, and the courts are without power, through contempt proceedings or otherwise, to require respondent railroad company to continue a gratuity or act of grace theretofore inuring to the benefit of said Harper and Walker; but the transportation of persons over respondents' lines of railway is a source of revenue for which it is entitled, under the law, to charge, and any order or decree of court, through a contempt proceeding or otherwise requiring said railroad company to extend free transportation privileges to one not entitled thereto as a matter of law or by contract right, is a deprivation of its property without due process of law, and violative of the rights of the respondent guaranteed to it under the Constitution and laws of the United States. (R. 1105-1106.)

25. The court erred in holding the respondents in

contempt and requiring said respondents as a purging of said contempt to:

> "Restore R. E. Stotzer, B. G. Hudson and Charles Ginsburg to the service as employes of said Texas and New Orleans Railroad Company without prejudice and without loss of seniority rights, and make whole said Stotzer, Hudson and Ginsburg, for any losses of pay they have sustained by reason of their discharge in violation of the temporary injunction herein, and in contempt of this court";

because there is no law which requires respondent railroad company to retain in its employ any particular person, and it has the inalienable right of selecting and retaining in its employ only such persons as it may choose to so select, employ and retain, and the respondent had the right to discharge said Stotzer, Hudson and Ginsburg for cause, or without cause so long as it violated no contract existing between it and them, and no such contract obligation is averred in the pleadings or found by the court to exist as a fact. The respondent cannot lawfully be compelled to restore to service or to continue in its service, or to accept as an employe, any person contrary to its own wishes or inclination or contract rights, and in ordering Stotzer, Hudson and Ginsburg restored to service, and in ordering the respondent railroad company to make whole to them any losses of pay they had sustained, the court has exceeded its power and authority. The things required to be done by the respondents as set forth in said subdivision 6 of the court's decree of February 11th contravene the constitutional rights of said respondents and constitute a deprivation of their property and property rights without due process of law. (R. 1106-1107.)

28. The court erred in ordering, directing and re-

quiring respondents not to recognize but to dis-establish the Association of Clerical Employes, because the respondents and representatives of said Association of Clerical Employes, heretofore entered into contracts and agreements relating to wages and conditions of service, each acting in good faith and not in intended violation, or violation, of this court's orders and decrees, but in the exercise of constitutional and statutory rights and powers, and such contracts and agreements cannot be destroyed by an order of this court without a hearing with all of the interested contractual parties before the court, nor without due process of the law of the land. (R. 1108.)

29. The court erred in holding the respondents in contempt because of the discharge of Stotzer, Hudson and Ginsburg because the evidence in this case shows that each of said persons were discharged for cause, as the employer had a right to do, the facts, conditions and circumstances surrounding the discharge of each of said employes having been fully shown by such evidence, and further because the proof in this case shows affirmatively that neither of the defendants, Lull, Waid or Torian, had any part in the discharge of the said employes, it appearing from such evidence that their respective discharges were upon orders from the superintendents of their respective divisions without consultation, conference or reference to the said defendants, and, so far as this record discloses, without knowledge on the part of said defendants of any activity on the part of said three employes in the Brotherhood of Clerks and because the evidence in this case shows that said employes were not discharged on account of their membership or interest in the Brotherhood of Clerks, nor because of any activity on their part in this controversy. (R. 1108-1109.)

30. The court erred in holding respondent Texas

and New Orleans Railroad Company in contempt because such holding is not supported by, but is contrary to, the evidence. (R. 1109.)

31. The court erred in holding respondent H. M. Lull in contempt because such holding is not supported by, but is contrary to, the evidence. (R. 1109.)

32. The court erred in holding respondent G. S. Waid in contempt because such holding is not supported by, but is contrary to, the evidence. (R. 1109.)

33. The court erred in holding respondent J. G. Torian in contempt because such holding is not supported by, but is contrary to, the evidence. (R. 1109.)

53. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because there is no power conferred upon the court to grant such injunction by any statutory provision of the United States, nor do complainants bring themselves within any settled or customary rules of practice in courts of equity authorizing and empowering courts to grant such injunction. (R. 1118.)

54. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical em-

ployes of said railroad company with respect to the right ofselecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because neither the Railway Labor Act in itself nor any law enacted by Congress, nor any custom or recognized rules of equity courts contemplate or permit the issuance of injunctions in controversies between an employer such as the respondent railroad company is, and employes such as the complainants are. (R. 1118-19.)

55. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating, or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the Railway Labor Act, under the terms of which the court has apparently granted the injunction, is self-executing and self-operating, and under its terms and provisions it is manifest that the court has no power by injunction or by any other means to direct, command or interfere with the activities and negotiations of the employer on the one hand and the employes on the other, in the matters covered by said Railway Labor Act. (R. 1119.)

56. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or

coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because it is the manifest intention of the Congress of the United States, as evidenced by the Railway Labor Act and the provisions of Section 52, Title 29, of the United States Code, to prevent and to prohibit the issuance of injunctions and other coercive orders and decrees in controversies and disputes between employes such as the complainants are and the employers such as the defendants are. (R. 1119-20.)

57. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent, and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of the railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the complainants' amended bill of complaint and the exhibits attached thereto and made a part thereof are insufficient as a matter of law to invoke the equitable powers and jurisdictions of this court, or to authorize this court to grant the equitable relief prayed for, and to issue its injunction as has been done in this case, it appearing therefrom that no property rights of the complainants are involved and no irreparable damage would be sustained by said complainants, if said injunction were denied. That as reflected by the complainants' bill of complaint, the controversy was one between two rival claimants for recognition by the

railroad company to represent employes of the class described in said amended bill of complaint, and that such recognition could confer no benefits or property rights on the complainants, it appearing from the terms of the Railway Labor Act itself that in each successive step to the adjustment board, to the mediation board and on to arbitration, depended upon the voluntary acts of the parties, and that no power, authority or right is conferred by said Act upon the representatives of any class of employes to compel the employer, the railroad company, to grant any demand or to make any kind of agreement, and as the recognition of any one group of persons over another group of persons could clothe them with no power or authority nor create any rights in them to compel the employer, railroad company, to any particular course of action, the designation or recognition of any such group, or the failure of the employer, railroad company, to recognize or designate any particular group as representatives of the class, could not in law affect any property right or inflict irreparable damage or injury upon the complainants. (R. 1120-21.)

58. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the respondent, railroad company, and its executive officers have the inherent and constitutional right to converse and communicate with the employes of such

railroad company and to express to such employes the wish of the employer, and to direct such employes as to the desires and purposes of such employer in the conduct of the employer's business in the line of such employes' relation to the employer. That any Act of Congress or order of court which prevents or tends to prevent the free exercise on the part of the employer of such rights, contravenes the inherent rights of the employer and the rights of such employer granted to it under the terms of the Constitution of the United States. That if the Act of Congress under which the court has acted, attempts or purports to confer any such power as the court has asserted, then it is an unconstitutional interference with the right of free speech, or free communication between employer and employe, and a deprivation of property and property rights without due process of law. (R. 1121-1122.)

59. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers, from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth, because the court is without power to grant an injunction in this cause, because the respondent railroad company and its executive officers have the right to seek to influence their employes in all matters relating to their employment, their relations to the employer, their attitude towards the employer and the officers and agents of such employer, their attitude as well as their relations to organizations, unions and brotherhoods and as to any other matter or conduct which may tend to affect their loyalty, their effi-

ciency or their capacity to properly discharge the duties of their employment. (R. 1122-23.)

63. The court erred in ordering and decreeing the temporary injunction herein perpetual and permanent and in enjoining the defendant, railroad company, its officers, agents and employes having and exercising executive, directory or supervisory powers from in any way or manner interfering with, intimidating or coercing the complainants or any of the clerical employes of said railroad company with respect to the right of selecting and designating representatives as in said decree set forth because the court is without power to grant an injunction in this cause because the proof introduced does not establish a cause of action for the extraordinary relief sought by and granted the complainants herein, in that it appears therefrom that no statuory right or right created by law or by any rule of equity exists in the complainants, nor any statutory duty, nor any duty imposed by law or by equity upon the respondents has been violated, or is theatened with violation. (R. 1125.)